Supreme Court, U.S.
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In The

Supreme Court of the United States

NORMAL PARM, JR., ET AL.,

Petitioners,

v.

MARK SHUMATE, in his official capacity as Sheriff of East Carroll Parish, Louisiana,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Circuit Court's new "Recreational Use Exclusion" restrict the public's right to use the navigable waters of America for recreational purposes under (i) the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution, (ii) the mandates of the "Equal Footing Doctrine" imposed upon all the states as a condition of admittance to the Union, (iii) federal common law, and (iv) the numerous Congressional enactments that declare recreational use of navigable waters of America to be both substantial interstate "commerce" under the Commerce Clause of the United States Constitution, and a legitimate use and activity permitted under the federal navigational servitude.

PARTIES TO THE PROCEEDINGS

The Petitioners in the proceedings are Normal Parm, Jr., Harold Eugene Watts, now deceased, herein represented by his widow, Ms. Glenda Watts, the duly appointed Administratrix of the Succession of Harold Eugene Watts, Fourth Judicial District Court, Parish of Morehouse, State of Louisiana, Roy Michael Gammill, William T. Rogers, and Robert Allen Balch. The Respondent is Mark W. Shumate, in his official capacity as Sheriff of East Carroll Parish, Louisiana.

The following persons or entities appeared as Amici in the District Court. The Amici in support of Petitioners were:

ROWA of Louisiana

Louisiana Crawfish Producers Association – West Inc.

Louisiana Wildlife Federation

Louisiana State Bass Federation

Waterways Access Association (of Louisiana)

Mississippi Bass Federation Nation

Arkansas State Bass Federation

Big Sun Bass Masters of Bellview Florida

Maple Bassmaster of Florida

Blackhawk Bassmasters of Illinois

PARTIES TO THE PROCEEDINGS – Continued

Bardstown Bassmasters of Kentucky

Kentucky State Bass Federation

Minnesota State Bass Federation

River Rats Bassmasters of Minnesota

Western Maine Anglers

Yankee Bassers Bass Club of Maine

Pennsylvania Bass Federation, Inc.

The Amici in support of Respondent were:

Walker Cottonwood Farms, LLC; and

Edward Wisner Donation

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued December 27, 2008.

OPINIONS BELOW

Originally, Magistrate Judge James Kirk was directed to make a report and recommendation to the District Court on the pending cross motions for summary judgment. The Magistrate Judge recommended judgment in favor of Petitioners in *Parm v. Shumate*, 2006 U.S. Dist. LEXIS 64080 (W.D. La. April 21, 2006); App. 50-95. The District Court granted judgment in favor of Respondent in *Parm v. Shumate*, 2006 U.S. Dist. LEXIS 61227 (W.D. La. Aug. 29, 2006); App. 23-40. Petitioners' motion for reconsideration was denied by the District Court in *Parm v. Shumate*, 2006 U.S. Dist. LEXIS 77506 (W.D. La. Oct. 11, 2006); App. 41-49.

Petitioners appealed the District Court's judgment to the United States Court of Appeals for the Fifth Circuit. The District Court's judgment was affirmed in *Parm v. Shumate*, 513 F.3d 135, 2007 U.S. App. LEXIS 29948 (5th Cir. La. 2007); App. 1-22, and Petitioners' motion for rehearing en banc was denied on January 28, 2008. App. 96.

STATEMENT OF JURISDICTION

On December 28, 2007, the United States Circuit Court of Appeals for the Fifth Circuit handed down its opinion in this matter, affirming the District Court's judgment. A timely petition for rehearing was denied on January 28, 2008.

This Court has jurisdiction to hear this appeal from the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY AUTHORITIES

Constitution of the United States, Fourteenth Amendment, Section 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . .

Constitution of the United States, Article I, Section 8, Clause 3:

> The Congress shall Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

United States Statute at Large, vol. 2, pp. 642 and 703 (1811):

> Provided, that it shall be taken as a condition upon which said State is incorporated in the Union, that the river Mississippi and the

navigable rivers and waters leading into the same and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of said State, as to the inhabitants of other States and Territories of the United States, without any tax, duty, impost or toll therefor, imposed by said State, and the above condition and also all other conditions and terms contained in the third section of the Act the title whereof is hereinbefore recited shall be considered, deemed and taken, fundamental conditions and terms upon which the said State is incorporated in the Union.

Title 33 United States Code, Section 10:

All the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways.

The Fish and Wildlife Act of 1956, Title 16 United States Code, Section 742a:

Declaration of policy. The Congress hereby declares that the fish, shellfish, and wildlife resources of the Nation make a material contribution to our national economy and food supply, as well as a material contribution to the health, recreation, and well-being of our citizens; . . . .

The Congress further declares that the provisions of this Act are necessary in order to accomplish the objective of proper resource development, and that this Act shall be administered with due regard to the inherent

right of every citizen and resident of the United States to engage in fishing for his own pleasure, enjoyment, and betterment, and with the intent of maintaining and increasing the public opportunities for recreational use of our fish and wildlife resources, and stimulating the development of a strong, prosperous, and thriving fishery and fish processing industry.

The Fish and Wildlife Coordination Act of 1985, Title 16, United States Code, Section 661:

For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development program, [the Secretary of the Interior is authorized to take certain coordinating actions in support of wildlife management].

The Magnuson-Stevenson Fisheries Management and Conservation Act of 1996, Title 16, United States Code, Section 1801:

(a) Findings.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas

are dependent upon fishing and related activities, ...

The Clean Water Act, Title 33, United States Code, Section 1251:

> **1251 Congressional declaration of goals and policies.**
>
> (a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act [33 U.S.C. 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 U.S.C. 1251 et seq.]:
>
> (2) It is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983; . . .

STATEMENT OF THE CASE

The Petitioners (also referred to as "Plaintiff-Fishermen") are all citizens and inhabitants of the United States who regularly utilize the navigable waters of the Mississippi River to boat and fish for pleasure and their personal consumption of the fish

and wildlife taken from the waters of the Mississippi River. The Plaintiff-Fishermen have been arrested for trespassing by the Respondent, the East Carroll Parish Sheriff, because they each have boated and fished in waters of the Mississippi River in East Carroll Parish.

It is undisputed that the Mississippi River is a navigable water body. App. 62.[1] The United States Geological Survey produced a topographical map of the disputed area, that was admitted into evidence. App. 123. It is undisputed that when the waters of the Mississippi River periodically rise and before reaching the federal high water mark, substantially all the riparian land inside the levee is inundated each year.[2] It is undisputed that some of the riparian land covered by the Mississippi River includes riparian land owned by Walker Lands, Inc. App. 44. Lastly, it is undisputed that the Plaintiff-Fishermen have used the waters of the Mississippi River that overlay the riparian bank for recreational boating and fishing, and that each has been arrested for doing so.[3]

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[1] "The parties do not dispute the navigability of the Mississippi River." App. 62.

[2] "The topographic map in evidence in this proceeding shows that the elevation in a few places on the lands is higher than 112 feet. At oral argument counsel for plaintiffs suggested, in answer to the court's inquiry, that approximately 95% of the lands are under water at the high water mark of 112 feet. That suggestion appears consistent with the topographic map." App. 57.

[3] "It is clear from plaintiffs' complaint and from their multiple briefs that plaintiffs seek to navigate on and to fish and

(Continued on following page)

This suit was initiated to stop the illegal arrest of the Plaintiff-Fishermen. The Plaintiff-Fishermen assert that multiple federal authorities preserve for the public the right to use the navigable waters of America for travel and recreational boating and fishing, across the surface of the navigable waters as those waters rise and spread across the riparian lands until the water reaches the federal high water mark.[4] In this case, the Magistrate Judge was instructed to make a report and recommendation to the District Court and recommended summary judgment in favor of Plaintiff-Fishermen. *Parm v. Shumate*, 2006 U.S. Dist. LEXIS 64080 (W.D. La. Apr. 21, 2006) App. 50-95. The District Court rejected these substantive legal recommendations, carving out a judicial exception to public navigation that holds that "recreational" use of navigable waters of America is unprotected by federal law and does not involve "commerce." App. 32-33. This "Recreational Use Exclusion" created by the District Court was the analytical basis

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hunt on waters between the ordinary low water mark and the ordinary high water mark of the Mississippi River. They do not seek authority to go upon dry land belonging to Walker Lands or others and do not seek to go upon waters which flood lands when the Mississippi rises above its ordinary high water mark of 112 feet." App. 58-59.

[4] "Plaintiffs argue that they have a federal right to fish on the Property when it is covered by the Mississippi River's waters because the Mississippi River is a navigable waterway of the United States. They contend that a federal navigational servitude burdens the Property, creating a public right to fish there." *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007). App. 14.

upon which the District Court granted summary judgment in favor of Respondent. App. 34. The United States Court of Appeals for the Fifth Circuit, adopted and affirmed the District Court's "Recreational Use Exclusion" to the public's rights of navigation and fishing in the waters of America, declaring that " . . . [n]either navigation nor commerce encompass recreational fishing." App. 16.

The Plaintiff-Fishermen asserted that the public's right to boat and fish the navigable waters of America has existed under common law since the American Constitution, and before in English common law. Equally, Petitioners submit that their right of navigation and piscary (fishing of public waters) has been recognized as a "privilege" protected by the Privileges or Immunities Clause of the Fourteenth Amendment to the Constitution; is a fundamental right of the public protected by Congressional mandate that same be preserved to the People as a condition of statehood; and further has been declared to be a proper use of navigable waters of America under the Commerce Clause.

Petitioners submit that each of these federal bodies of law cumulatively reserve to the public a basic right of travel, navigation and fishing in the navigable waters of America. Petitioners respectfully submit that the lower courts committed clear error in creating a "Recreational Use Exclusion" to these existing federal principles of law.

REASONS FOR GRANTING THE WRIT

A. The Circuit Court Decision Substantially Disregards Centuries-Old Federal Authority By Creating a "Recreational Use Exclusion" to the Public's Right to Travel on, Navigate and Fish the Navigable Waters of America.

Prior to the decision of the Circuit Court in this case, the legal principles establishing the legal right of the public to travel upon, navigate, fish and use the navigable waters of America were well-settled within four bodies of law: (i) the Privileges or Immunities Clause of the Fourteenth Amendment to the Constitution, (ii) the Congressional enactments known as the "Equal Footing Doctrine" which mandated that each state, as a condition of statehood, preserve to the public the use of its navigable waters forever, (iii) English common law carried into American common law, and (iv) Congressional enactments, and regulatory determinations by the Corps of Engineers, that confirm the public's right to recreationally navigate, boat, and fish under the federal navigational servitude and the Commerce Clause.

Notwithstanding these very substantial and settled bodies of law, which uniformly support public navigation for all reasonable purposes, the Circuit Court held that the public has no federally created right, nor any federally protected right, to travel on or use any of the navigable waters of America for recreational purposes. The Circuit Court's decision, for the

first time in American jurisprudence, creates a "Recreational Use Exclusion" to the public's general right of navigation on public waters.

The substantive, settled law that was disregarded includes the landmark decisions that have confirmed the public's right of travel, navigation and recreational use of public waters. The Circuit Court disregarded the landmark case known as *The Slaughterhouse Cases* (83 U.S. (16 Wall.) 36, 79-80 (1873)), in which this Supreme Court declared that the public's right to travel on and navigate the navigable waters of America is one of those "privileges" preserved by the Privileges or Immunities Clause of the Fourteenth Amendment to the Constitution. The Circuit equally ignored the landmark cases of *Arnold v. Mundy*, 6 N.J.L. 1 (New Jersey 1821) and *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842).

Secondly, the Circuit Court's decision disregards the Congressional mandate, known as the "Equal Footing Doctrine," directed to every state as a precondition of statehood, which required that the navigable waters within the state's border remain forever open to public navigation. More specifically the "Equal Footing Doctrine" requires that each state reserve the public use of the navigable waters for " *. . . the inhabitants of said State [and] to the inhabitants of the other States and Territories of the United*

States, ..."[5] See, also 33 U.S.C. 10. Again, the Circuit Court holds that its "Recreational Use Exclusion" supercedes these Congressional requirements for statehood.

Thirdly, the Circuit Court's reliance on its own "Recreational Use Exclusion" from public navigation disregards this Supreme Court's many holdings that expressly recognized under the common law, the public rights of navigation and piscary (fishing in navigable waters) in the navigable waters of America. Both *Martin v. Waddell's Lessee* (41 U.S. 367, 414 (1842)), and *Smith v. Maryland* (59 U.S. (18 How.) 71, 75 (1855)), reaffirm that the public's right to navigate includes a common " . . . *public right of fishery* . . . " in navigable waters. In *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900), this Court reaffirmed that the public's right to navigate and fish the navigable waters derives from the common law of navigation holding that "[t]he Common law recognizes navigation as an interest of paramount importance to the public."

Fourthly and finally, the Circuit Court's decision disregards the pre-eminent power and right of the Congress to determine those activities that are permitted within the federal navigational servitude. Numerous Congressional enactments specifically recognize recreational fishing and boating as a substantial commercial activity authorized by Congress to be conducted in the navigable waters of America.

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[5] United States Congressional Statute at Large, vol. 2, pp. 642 and 703 (1811).

These Congressional enactments include The Fish and Wildlife Act of 1956 (16 U.S.C. 742a-742j), The Fish and Wildlife Coordination Act of 1985 (16 U.S.C. 661-668); The Magnuson-Stevenson Fisheries Management and Conservation Act of 1996 (16 U.S.C. 1801 et seq.) and The Clean Water Act (33 U.S.C. 1251 et seq.) See, 3-5.

The Circuit Court's new "Recreational Use Exclusion" calls all these long established principles of federal navigation law into question, and eliminates all federal protection of recreational boating in America's waters. The Circuit Court's judgment, if left standing, will support the continuing shrinkage of the public's use of the federal navigational servitude, on a case by case basis, eliminating those activities that a court might now, or in the future, deem to be too "recreational" in nature. This potential for further disruption of recreational activities on America's waters is a threat of national scope. Such a national threat to well settled federal law strongly argues in favor of the granting of the petition for writ of certiorari.

B. The Circuit Court Holding Will Substantially Disrupt State Law on Public Navigation for Recreational Purposes.

The navigable laws of many of the states run parallel to established federal precedent, including the long established rights of public navigation and fishing. Should this new "Recreational Use Exception" to public navigation be left unreviewed, it will be necessary for many states to review the State's

laws on navigation, to determine if this new federal exclusion necessarily alters state navigational precedents protesting recreational use by the public under state law. Petitioners submit that the navigation laws of Louisiana, Michigan, Mississippi, North Carolina, Connecticut, Rhode Island, and Florida, to name a few, will be called into question if public navigation under federal law includes only direct commercial uses, and not recreational uses. See, state case law cited, *supra* 33-34.

Petitioners submit that this massive federal exclusion of public use will set in motion the contraction of public use under state law in reliance on the "Recreational Use Exclusion." This potential for national disruption and restructuring of public navigation law strongly supports the granting of the writ in this matter.

C. The Fishing Public and Supporting Businesses Recognize the Circuit Court's "Recreational Use Exception" to be a Substantial Economic Threat to Commerce Surrounding the Public's Recreational Use of the Navigable Waters of America.

Lastly, the boating and fishing public, and their supporting businesses, rightly recognize the holding of the Circuit Court as a substantial threat to commerce that supports recreational and personal use of navigable waters. The substantial economic devastation that the new "Recreational Use Exception" will inflict on American business cannot be overestimated or overstated.

Sixteen amici groups, from ten states submitted briefs to the lower courts in support of the public's right to recreational boating and fishing in the navigable waters of America. See, *District Court Ruling*, App. 24. Thereafter, in the Circuit Court, more than thirty-five amici groups, from more than twenty different states, moved to submit an amicus brief in favor of public navigation and fishing. These groups are from California, Florida, Maine, Pennsylvania, Minnesota, Utah and all points in between. These groups include statewide fishing groups and statewide conservation groups, who all support public use of navigable waters for recreational purposes. The unavoidable economic damage to be inflicted on the boating, fishing and marine commerce of America by excluding recreational uses, provides full justification if not a mandate under the rules of this Court, to carefully review the Circuit Court's extraordinary restriction on public access to navigable waters.

LEGAL ARGUMENTS THAT SUPPORT GRANTING THE WRIT

A. Facts of the Case.

The Plaintiff-Fishermen regularly boat and fish on the waters of the Mississippi River in East Carroll Parish, Louisiana. To say the least, the Mississippi River, in East Carroll Parish, provides to the American public the outdoorsman's dream: Big Water, Big Fish and the Big Outdoors. The many remnant

channels, river beds, shoots, inlets and estuaries have names such as Bunch's Cut-Off, Louisiana Bend, Old River, the Old Channel, Gassoway Lake, Little Gassoway Lake, Doe Lake, and Snag Lake. Other easily accessible and fishable inlets, swales and flats are periodically formed and destroyed by the raging river. But, during their existence, these waters are all regularly fished in, hunted on and used by the boating public. These changing components of the Mississippi River stretch more than five miles laterally (east and west) across the riverbed, from the western levee to the eastern levee, cumulatively resulting in the ever-changing water's edge of the Mississippi River in East Carroll Parish, Louisiana and Issaquena County, Mississippi.[6] See, USGS Map, App. 123.

The Petitioners and the public use every kind of water craft, from small aluminum skiffs to twenty or thirty foot modern fishing rigs equipped with sonar, live wells, GPS location devices, underwater imaging systems and the like, along with thousands of dollars of fishing gear and tackle. The waters fished by the

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[6] The natural forces of the River that arise each year as this River rises and falls thirty to fifty feet regularly moves the channels eastward or westward, scarring and gouging old and new waterways in the riparian lands each year. The mighty Mississippi River decides each year where its main channel will lay within a corridor between the levees that is approximately five miles wide. See, USGS Map, App. 123. See, *Walker Lands, Inc.*, App. 103-105.

Plaintiff-Fishermen vary in depths from five (5) feet to more than forty (40) feet, mostly outside the main channel where the shallower waters, and the bait fish, and the spring spawn all occurs.

There is no dispute that the Plaintiff-Fishermen are using waters at water levels between normal low and the normal high water mark in Louisiana, as these waters overlay the riparian land of the Mississippi River. The District Court confirmed that Plaintiff-Fishermen were over the riparian riverbed. App. 90.

Many of the geological and hydrological facts relied upon by the parties and the lower courts were detailed in a related State Court case, *Walker Lands, Inc. v. E. Carroll Parish Police Jury*.[7] *Walker Lands* determined the ownership of the riparian land inside the levee in Louisiana. Ownership had become unclear because of the ever changing location of the main channel of the Mississippi River in this riparian landscape since 1812. The state court determined that the normal low water mark in this area is 77 feet Mean Sea Level ("MSL"), and that the normal high water mark is 112 MSL. In other words, the state court found that the Mississippi River, in this area, naturally and regularly rises and falls on an annual

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[7] *Walker Lands, Inc. v. E. Carroll Parish Police Jury*, La. App. 38376, 871 So.2d 1258, 2004 La. App. LEXIS 977 (La. App. 2 Cir. Apr. 14, 2004); App. 101-122.

basis a full thirty-five (35) feet. This is many times deeper than the main navigational channel.[8]

The state court determined record ownership of the riparian bank under Louisiana law. However, the state court set aside all lower court decisions on the public navigational rights, affirmatively choosing to allow these issues to be resolved in this federal forum.[9] The State appellate court knew this Court had jurisdiction, and deferred these significant federal determinations to this federal forum.

B. Legal Bases of Petitioners' Action and Supporting Federal Rights.

Seldom are the legal rights presented to this Court first recognized in the *Magna Charta*. Seldom are the rights presented to this Court first recognized and protected as a specific requirement placed on every state in the Union as a precondition to its admission to the Union. Seldom are the rights recognized as one of those fundamental "privileges" specifically protected by the Privileges or Immunities Clause of the Fourteenth Amendment of the

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[8] The Corps of Engineers maintains a nine (9) foot deep main channel in the upper Mississippi River, and a thirty (30) foot deep main channel in the lower Mississippi River.

[9] The state court " . . . pretermit[s] discussion of the available use of these legal public servitudes during times of high water." App. 119.

Constitution. But, such is the unique legal heritage, and constitutional foundation of the right of public navigation and piscary (fishing) in the navigable waters of America. Few other rights have such a long and preeminent legal lineage.

Plaintiff-Fishermen submit that federal law preserves to the Petitioners, and the public, the right to navigate on and fish in the navigable waters of America, under:

1. The Privileges or Immunities Clause of the Fourteenth Amendment of the United States Constitution;

2. The "Equal Footing Doctrine" which mandates that navigable waters be forever free for public navigation as a condition of admittance to the Union;

3. Federal common law recognizing the public's right to reasonably use the navigable waters of America; and

4. Specific Congressional declarations that recreational use of navigable water comprises a proper use of the navigational servitude, and comprised substantial "commerce" under the Commerce Clause of the United States Constitution.

It is difficult to explain the reluctance of the lower Circuit Court to adequately consider the time-honored jurisprudence of this Supreme Court that

have declared that the public's right of navigation and piscary to be a settled, centuries-old right. It appears that the Circuit Court's legal error resulted from its singular focus on the "recreational" nature of the Petitioners' activities as distinguished from "commercial" activities. This limited analysis caused the Circuit Court to create a new, simplistic "Recreational Use Exclusion" to the public's right of navigation.

The Circuit Court totally rejected all arguments that recreational navigation is protected anywhere on navigable waters. Instead, the Circuit Court held that "recreational" fishing was not "commerce" or "commercial navigation" and thus was not an activity contemplated or authorized by federal navigation law.[10] Based on this novel "commerce v. recreation"

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[10] "As implied by its very name and the constitutional provision from which it arises, the federal navigational servitude is concerned with *navigational* rights and *commerce*. See *United States v. Montana*, 450 U.S. 544, 551 (1981) ('The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.'); *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979) ('The navigational servitude . . . gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce.'); . . . . **Neither navigation nor commerce encompass recreational fishing.**"

(emphasis added) App. 16.

analytical dichotomy, the Circuit Court simply held "commercial" use of the navigable waters is the only legitimate authorized use of navigable waters, and thus "recreational" use of navigable waters was unauthorized under federal law.

This newly articulated "Recreational Use Exclusion" to public navigation eliminates federal assurance of recreational travel, navigation, boating or fishing in the navigable waters of America. The Circuit Court held it to be an issue for the state to determine whether recreational travel, navigation, boating or fishing would be permitted on navigable waters within its jurisdiction.

With respect to the Circuit Court, Plaintiff-Fishermen submit that the right of navigation, and the permitted uses of navigable waters by the public has always been guaranteed by federal authorities, and that recreational navigation in today's America is as "commercial" as towing a barge, under the federal navigational servitude.

1. The Right of the Public to Navigate and Fish Navigable Waters Is a National Privilege Protected by the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution.

Petitioners submit that never before, in two hundred years of American jurisprudence has a federal court held that the public's right to use the

navigable waters of America for travel, boating or fishing was limited to direct commercial use and excluded public recreational use. Until this opinion, the People of America had the unquestioned privilege of travel, navigation and fishing on the navigable waters of America. Hereafter, the Circuit Court's holding requires the public to stop and explain their purpose on the navigable waters to determine if travel or navigation is permitted.

The Circuit Court's opinion that recreational fishing is unprotected by federal law stands alone and in direct conflict with this Supreme Court's long established jurisprudence on the issue. In 1842, in *Martin v. Waddell's Lessee* (41 U.S. 367, 414 (1842)), this United States Supreme Court expressly recognized a then one hundred fifty year old right of all citizens to exercise the rights of navigation and piscary (fishing) in the navigable waters of America. This Court laid out the public right's legal history explaining that this common right had previously been recognized under English law beginning with the signing of *The Magna Charta*,[11] and continuing in

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[11] "But from the opinions expressed by the justices of the Court of King's Bench, in the case of *Blundall v. Catterall*, 5 Barn. and Ald. 287, 294, 304, 309; and in the case of *The Duke of Somersett v. Fogwell*, 5 Barn. and Cress. 883, 884, the question [of whether the King had granted private property rights in navigable waters and the rights of piscary therein] must be regarded as settled in England against the right of the king since *Magna Charta* to make such a grant." *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842).

effect thereafter into American common law under the United States as the revolutionary governmental successor of England. The seminal case on public navigation and fishing rights was handed down only thirty-five years after the adoption of the Constitution, *Arnold v. Mundy*, 6 N.J.L. 1, 24-25 (1821), which was followed by this Court in *Martin*.

In the *Martin* case, this Supreme Court emphasized the fundamental legal sanctity of the public's right to navigate and fish the navigable waters of America, declaring that " . . . *the public and common right of fishery in navigable waters, . . . has been so long and so carefully guarded in England, and . . . preserved in every other colony founded on the Atlantic borders, ...*" *Martin v. Waddell's Lessee*, 41 U.S. 367, 414 (1842). Following this rational, this Supreme Court confirmed the interrelationship of travel, navigation and fishery in *Morris v. U.S.*, 174 U.S. 196 (1899), declaring

> "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above highwater mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, . . . " *Morris*, 174 U.S. at 237.

Following *Waddell*, in 1855, this Supreme Court, in *Smith v. Maryland*, reaffirmed that the right to utilize the navigable waters of America and to fish therein, was a common " . . . *public right of fishery* . . . " to be held in trust and protected by the state government. *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855). This Court has repeatedly affirmed that the People hold the common rights of use and ownership of the navigable waters and the right to use the abundance of the fishery therein, and that title shifts to each state only in binding trust for the People's own common enjoyment and benefit.

Ultimately, in 1873, following the adoption of the Fourteenth Amendment, this Supreme Court affirmatively held that the People's common right of navigation and fishing was one of the "privileges" held by the People, and preserved under the Privileges or Immunities Clause of the Fourteenth Amendment.[12] In *The Slaughterhouse Cases*, this Court declared that "[t]he right to use the navigable waters of the United States, however they may penetrate the territory of the several States, . . . , are dependent upon citizenship of the United States, and not citizenship of a State." *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1873). In *Baldwin v. Fish & Game Commission,* 436 U.S. 371 (1978), this Court reaffirmed the constitutional protection granted to

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[12] *Constitution of the United States of America, Fourteenth Amendment, Privileges or Immunities Clause.*

public navigation, as enumerated in *The Slaughterhouse Cases*, confirming the continuing accuracy of the privileges enunciated in *The Slaughterhouse Cases*, including the common right of travel, navigation and fishing. Since that affirmation, no other jurisprudence nor legislative act has altered or diminished the constitutional "privilege" preserved for the People to navigate and fish the navigable waters of America.

With due respect to the Circuit Court, the Circuit Court's reliance on the novel "Recreational Use Exclusion," is in conflict with the "Privileges or Immunities Clause" as recognized by this Court's settled holdings on the subject. The public's right to navigate and fish navigable waters is a right older than the Constitution, and its unexplained destruction by the Circuit Court is done without authority. Petitioners pray that the writ be granted to review this extraordinary holding.

2. The Right of Public Navigation and Fishing Is a National Right Affirmed by the "Equal Footing Doctrine" Mandates Placed Upon Each State as a Condition of Admittance to the Union.

As new states were admitted into the Union, all the navigable waters of America were transferred to the respective states, to be held for the common use of the public. This funda nental preservation of the rights of the public in their navigable and tide waters held in common ownership and for common use was

accomplished through Congressional legislation implementing the legal principle known as the "Equal Footing Doctrine." An "Equal Footing Doctrine" statute was passed by Congress as a precursor to the admittance of each new state. For example, preceding the admission of the State of Louisiana into the Union in 1812, Congress declared:

> " . . . that it shall be taken as a condition upon which said State [of Louisiana] is incorporated in the Union, ***that the river Mississippi and the navigable rivers and waters leading into the same*** and into the Gulf of Mexico, ***shall be common highways, and forever free, as well to the inhabitants of said State as to the inhabitants of other States and Territories of the United States, without any tax, duty, impost or toll therefor***, ..." United States Congressional Statute at Large, vol. 2, pp. 642 and 703 (1811).

See, *Boykin & Lang v. Shaffer*, 13 La Ann 129 (1858).

The legal effect of the "Equal Footing Doctrine" has been the continuing Congressional assurance that the People of America are granted a uniform and equal right of public navigation and fishing in all the navigable waters of America. The premiere constitutional importance of this public right is obvious, when one considers the fact that Congress declared that the preservation of public navigation and fishing was a pre-condition imposed on each state to be met before a territory could become a state.

Notwithstanding the fact that the "Equal Footing Doctrine" is preserved using language that speaks of maintaining the navigable waters as " . . . common highways . . . ," this Supreme Court long ago recognized that the public right of navigation on these "public highways" has consistently included the right to fish these navigable waters. In the landmark decisions of *Shively v. Bowlby* (152 U.S. 1, 57 (1894)) and *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842), this Supreme Court recognized that use of navigable waters was " . . . to be freely used by all for navigation and fishery, as well for shell fish as floating fish." *Shively*, 152 U.S. at 16, quoting *Martin v. Waddell's Lessee*.

Stated simply, this Court has long recognized that "fishing" is a component part of the right of "navigation" in America. This settled principle of navigation law was disregarded by the Circuit Court without explanation. Had the Circuit Court properly recognized that "fishing" is a component of "navigation," the Circuit Court would have held that the Petitioners' navigation to fish was protected in the Mississippi River across the surface of the navigable waters up to the high water mark. The Circuit Court left unexplained the legal basis that caused it to create a "Recreational Use Exclusion" to limit these centuries-old rights of navigation and piscary in America.

Another important corollary of the "Equal Footing Doctrine" mandate of Congress, was disregarded by the Circuit Court. The pre-eminent right of public navigation under the "Equal Footing Doctrine"

necessarily preserved to the People the right to navigate and fish the waters of America up to normal high water, as they rise over, and recede from the riparian bank of a navigable water body. Having excluded "fishing" and "recreational fishing" from the concept of navigation, the Circuit Court granted ownership and control of the navigable waters of America to the riparian landowners along the navigable waterbody. This holding is in direct conflict with the principles of public navigation law that have recognized the superiority of the right of public use of navigable waters, over and above the subordinate rights of a riparian landowner. In 1913, this Court affirmed that "[o]wnership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913). Affirmed: *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). Likewise, the Fifth Circuit Court previously followed *Chandler-Dunbar* and reaffirmed that "[t]his navigational servitude is an extremely old concept – owners of property or property rights within navigable waters take those rights fully cognizant of their limited nature. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950); *Gibson v. United States*, 166 U.S. 269 (1897)." *Coastal Petroleum Co. v. United States*, 524 F.2d 1206, 1209 (5th Cir. 1975). Equally, the Corps of Engineers, consistent with these many court holdings, has also affirmed that any rights held by a riparian owner is a subordinate interest to the right of the public to navigate and fish navigable waters, declaring that:

> "Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody." 33 C.F.R. 329.11(a). App. 99.

Chandler-Dunbar, *Kansas City Life Ins.*, *Gibson*, *Coastal Petroleum* and the authoritative regulations of the Corps of Engineers[13] all confirm that the public's right of navigation and use of navigable waters in America in those waters overlaying the riparian riverbed, is a prior, superior legal right to any right of riparian ownership.

Nonetheless these multiple authorities, all issued more than one hundred years ago, were disregarded, and for the first time, the Circuit Court held that the "Recreational Use Exclusion" eliminates recreational use of navigable waters as a permitted activity in navigable waters. Following its erroneous logic, the Circuit Court held that the riparian owner has ownership and control of the navigable waters overlaying the riparian riverbed.

This extraordinary limitation on public navigation must be reviewed. To deny this petition, allows

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[13] "This regulation . . . prescribes the policy, practice and procedure to be used . . . in answering inquiries concerning navigable waters of the United States." 33 C.F.R. 329.1. App. 98.

the Circuit Court's "Recreational Use Exclusion" to public navigation to stand disregarding the "Equal Footing Doctrine" mandate of public use imposed on every state. The conflict between the Circuit Court's judicial "Recreational Use Exclusion" and the Congressional "Equal Footing Doctrine" requires that this petition be granted.

3. The Right of Public Navigation and Fishing Is a National Right Recognized Under Federal Common Law.

The Circuit Court held that the Petitioners' ". . . argument . . . based upon purported federal common law is unavailing," choosing to limit any common law rights of navigation to "commerce" and thereby excluding "recreational use" from permitted navigation. *Parm v. Shumate*, 513 F.3d 135, 144, n.5 (5th Cir. 2007); App. 18.

First, the holding in this case is in direct conflict with the Fifth Circuit Court's prior holding in *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356, 359 (5th Cir. 1931), which recognized that

> "[t]he public right of navigation entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property gratuitously or for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common."

In this case, the Circuit Court unilaterally and affirmatively chose to overturn its own previous holding in *Silver Springs*, and hereafter limit public navigation to commercial navigation, such as paid tourist cruising as was involved in *Silver Springs*. The Circuit Court reversed itself without explanation, and in conflict with numerous holdings of this Supreme Court, and other courts of America.

It is clear that the *Silver Springs* holding, as originally issued, is consistent with this Supreme Court's holdings in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 436 (1892) and *U.S. v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913), holding that navigation is a general public right of multiple uses. In each of these cases cited above, this Supreme Court acknowledges the common right of ownership and use reserved to the public, and the broad, flexible activities included in a wide variety of "navigation" that occurs by the public.

More directly, this Supreme Court held in 1894, in the case of *Lawton v. Steele*, 152 U.S. 133, 139 (1894), that "[a]t common law the right of fishing in navigable waters was common to all." As this Court knows, the right of public navigation first arose in the common law of England, and was preserved into American common law. Equally, the common law of navigable waters of America has recognized and protected the public's rights of common navigation and fishing as a substantially inalienable right of the People. This Supreme Court has long ago confirmed that "[t]he Common law recognizes navigation as an

interest of paramount importance to the public" (*Scranton v. Wheeler*, 179 U.S. 141, 163 (1900)) and that any title to the riparian land " . . . is a qualified title, a bare technical title, . . . held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation" (*Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979)). The uniformity of these common law principles is obvious when one reviews the navigable water cases that evolved in America, based upon the public importance of navigation, fishing, and hunting to settle the American continent. Conversely, never before has a "Recreational Use Exclusion" been articulated by an American court.

The common law of public navigation is fundamentally federal in nature, priority and Congressional mandate. The public has the pre-eminent right to use navigable waters. The Fifth Circuit Court, in *Silver Springs*, consistent with the many other court rulings, affirmed the riparian owners " . . . cannot, any more than can one who has no title to riparian or submerged land, acquire an exclusive right to use navigable water opposite his upland for travel or navigation for purposes of business or of pleasure or diversion." *Silver Springs*, 50 F.2d 356, 359 (5th Cir. 1931). This holding, based in common law, is specifically based upon the Florida Supreme Court's determination in 1911, in *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 558-559, 57 So. 428 (1911), that the common law of America, recognizes the public's

superior right of navigation and fishing in navigable waters. Further, the Florida Supreme Court found that the public's common law right of navigation was preserved and affirmed by the "Equal Footing Doctrine." The culmination of this legal logic sequence is the recognition that the common law right of public navigation and piscary was preserved to the People through the uniform mandates of public navigation in the "Equal Footing Doctrine." The riparian owners have no effect on public navigational rights reserved to the People and the federal government.[14]

To be clear, a single exception to the pre-eminent right of public use has been recognized in the federal common law jurisprudence. This exception allows a state to alienate or limit the public's common right of navigation and fishing but only " . . . *when that [limitation] can be done without substantial impairment of the interest of the public in the waters*, ... (Emphasis added)" *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 436 (1892). Clearly, the "Recreational Use Exclusion" cannot logically "enhance" public navigation by denying to the American people their right of access and use of navigable waters.[15] Further, the

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[14] The Corps of Engineers existing regulations equally direct that the ownership rights of riparian landowners, or high land owners, is irrelevant to the public's right of use of navigation waters. 33 C.F.R. 329.11(a)(2), App. 99-100.

[15] Louisiana preserves in the Louisiana Constitution, Article I, the inalienable rights of its People, which includes the *"[t]he freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a*

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Circuit Court did not suggest that this "Recreational Use Exclusion" was derived from any particular act of government, state[16] or federal.

Another significant legal problem arises if the Circuit Court's holding that there is no federal right of public navigation is affirmed. Many states have formulated their navigation law with the understanding that these four bodies of federal law preserved the public's right to recreational use as federal mandates on the states. With the declaration of a "Recreational Use Exclusion," any state that has held that its rights are based in, or are compelled by, federal navigational rights including "recreational" use, have lost the federal justification for "recreational" use. Reliance on numerous states, have assumed the federal nature of the People's common right of navigation and piscary, including **Louisiana**[17] (*State v. Barras,* 615 So.2d

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valued natural heritage that shall be forever preserved for the people." Louisiana Constitution, Article I, Section 27.

[16] Louisiana jurisprudence fully concurs with the inalienable nature of the public's use of navigable waters. *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576, 1974 La. LEXIS 4480 (La. 1974); See, *O'Brien v. State Mineral Board*, 209 La. 266, 24 So.2d 470, 1945 La. LEXIS 933, 1946 La. LEXIS 697 (1945); *LSA-R.S. 9:1107*; *NOTE: Property – Susceptibility of Beds of Navigable Waters to Private Ownership*, Stephen H. Kupperman; 50 Tul. L. Rev. 193 (1975).

[17] In the Circuit Court opinion, Louisiana's bank servitude provided in Louisiana Civil Code Article 456 provides that "[t]he banks of navigable rivers or streams are private things that are subject to public use" has been applied to ONLY allow use of the navigable waters overlaying the bank only " . . . for navigational

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285, 288 (La. 1993); **Michigan** (*Glass v. Goeckel*, 473 Mich. 667, 703 N.W.2d 58, 64, 2005 Mich. LEXIS 1314 (2005)); **Mississippi** (*Ryals v. Pigott*, 580 So.2d 1140, 1147, 1990 Miss. LEXIS 694 (Miss. 1990)); **North Carolina** (*Gwathmey v. State ex. rel. Department of Environment, Health & Natural Resources*, 342 N.C. 287, 464 S.E.2d 674, 1995 N.C. LEXIS 678 (1995)); **Connecticut** (*Delinks v. McGowan*, 148 Conn. 614, 620, 173 A.2d 488, 491 (1961)); **Rhode Island** (*City of Providence v. Comstock*, 27 R.I. 537, 65 A. 307 (1906)); and **Florida** (*Thiesen v. Gulf, F. & A. Ry. Co.*, 75 Fla. 28, 58; 78 So. 491, 501 (1917) and *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 558-559, 57 So. 428 (1911)).[18]

As this list of state cases illustrates, much of the state law on navigability is premised on a "federal" foundation, based in English (now federal) common law of public navigability and the "Equal Footing Doctrine" mandates of statehood, that cumulatively protect the public's right to navigate and fish the

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purposes." *Walker*, at App. 119, n.16; *Parm*, at App. 2-21. Therefore, like these other states, Louisiana has applied its law assuming that under federal law "navigation" is limited to commercial uses, and excludes recreational uses. This is a perfect illustration of the disruption of state navigational law that will occur if the federal navigational rights are limited to "commercial" use alone.

[18] Also see *COMMENT: Floating On Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West*; Ravis H. Burns; 5 Wyo. L. Rev. 561 (2005), University of Wyoming.

navigable waters of America. It is imperative that this Court recognize that the holding of the Circuit Court, and in particular this national "Recreational Use Exclusion," significantly reduces the public's right to use navigable waters under federal law, and that it equally destroys the federal law foundation relied upon by many of the states.

The long established principles of public navigation articulated by this Supreme Court, and the Supreme courts of many of the other states, all confirm that there exists a fundamental federal common law that recognizes and protects the rights of the public to travel in, navigate on and fish in the navigable waters of America. The conflict between the established common law concerning navigable waters and the Circuit Court's holding is national in ramification, and compels the overturning of long. established principles of governmental rights, state and federal. This sudden deviation from established precedent argues strongly that this writ of certiorari should be granted.

4. The Right of Public Navigation and Fishing Is a Congressionally Recognized Public Use of Navigable Waters Under the Federal Navigational Servitude and Under the Commerce Clause.

As noted earlier, the Circuit Court focused its analysis on a simplistic dichotomy between "recreational" and "commercial" use of navigable waters by

the public, based upon the "Commerce Clause"[19] foundation for the federal navigational servitude.[20] The Circuit Court started with the proposition that in determining whether federal law created a power or right, " . . . it is for Congress to decide whether latent federal power should be exercised to displace state law." *Parm v. Shumate,* 513 F.3d 135, 144 (5th Cir. 2007), citing *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). App. 18. The recognition of the superior right of Congress to determine the use of navigable waters is a long established and recognized legal standard articulated by this Court as well.[21]

The lower Circuit Court properly recognized that this federal navigational servitude is the " . . . dominant servitude over navigable waters of the United States." *Parm v. Shumate,* 513 F.3d 135, 142 (5th Cir. 2007); App. 14-15. Further, and more importantly in light of the lower court's legal errors, the Circuit Court rightly recognized that once a waterway is

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[19] *Constitution of the United States, Article I, Section 8, Clause 3.*

[20] The Circuit Court addressed this question thus: "As implied by its very name and the constitutional provision from which it arises, the federal navigational servitude is concerned with navigational rights and commerce." App. 16.

[21] In 1940, in *United States v. Appalachian Power Co.*, this Court affirmed that Congress has the constitutional power to determine what is "commerce," that " . . . navigable waters are subject to national planning and control in the broad regulation of commerce granted to the Federal Government." *United States v. Appalachian Power Co.*, 61 S. Ct. 291, 308 (1940).

determined to be navigable under law, the navigable nature of that navigable waterway " . . . extends laterally to the entire water surface and bed of a navigable waterway, which includes all the land and waters below the ordinary high water mark." 33 C.F.R. 329.11(a). App. 99. *Parm v. Shumate,* 513 F.3d 135, 143 (5th Cir. 2007); App. 15. Conforming to these established divisions of public right and private ownership, the Corps of Engineers further established by regulation that "[a] determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity." 33 C.F.R. 329.4. App. 98.

However, the Circuit Court then unexpectedly erred by enunciating the "Recreational Use Exclusion" to the public's right of navigation and fishing. Unfortunately, the Circuit Court ignored the holding of this Court in *Phillips Petroleum Company v. Mississippi*, which recognized that the federal interests in navigable waters extend well beyond "commercial" use, and includes flood control, public use and other governmental interests. *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469 (1988). In *Phillips Petroleum Company*, this Supreme Court reaffirmed that it " . . . reject[s] the dissent's assertion that 'the fundamental purpose of the public trust [navigable waters and trust lands] is to protect commerce. . . .'" *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 476 (1988). Therefore, the nature of the activities encompassed by navigation clearly goes beyond limited commercial activities.

Further, had the Circuit Court reviewed the body of Congressional mandates involving recreational boating and fishing on navigable waters, the Circuit Court would have found numerous Congressional enactments that recognize both the commercial substantiality[22] of "recreational" boating and fishing in America, and the affirmative recognition by Congress that "recreational uses" are legitimate uses of the navigable waters of America. See, The Fish and Wildlife Coordination Act of 1985 (16 U.S.C. 661-668); The Fish and Wildlife Act of 1956 (16 U.S.C. 742a-742j); The Magnuson-Stevenson Fisheries Management and Conservation Act of 1996 (16 U.S.C. 1801 et seq.); and The Clean Water Act (33 U.S.C. 1251 et seq.). See, 3-5.

Again, the Circuit Court should have deferred to the power of Congress under the Commerce Clause, as "[s]o unfettered . . . over the navigable streams of the country that its judgment . . . is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control." *U.S. v. Chandler-Dunbar Co.*, 229 U.S. 53, 64 (1913). Congress has the plenary authority to decide the width of navigable waters. *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 264

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[22] For the economic impact of fishing and boating in Louisiana, see, Website for Louisiana Department of Wildlife and Fisheries; Education/Research; Economic Impact. Study Accessible under website of Louisiana Department of Wildlife and Fisheries (http://www.wlf.louisiana.gov/pdfs/education/Economic%20Benefits%20of%20FishWLBoatingResources2003.pdf, p. iv)

(1915). The Circuit Court should have deferred to the Congressional delegation of authority to the Corps of Engineers and their regulatory directives. Pursuant to that delegation, the Corps of Engineers has determined that the federal navigational servitudes " . . . includes all the land and waters below the ordinary high water mark." 33 C.F.R. 329.11. App. 99.

It is not the prerogative of the Circuit Court to replace Congressional mandates and enactments with a judicial "Recreational Use Exclusion" inconsistent with Congressional enactments approving recreational use of navigable waters under the Commerce powers.

Again, the holding of the Circuit Court, standing in conflict with the declarations of Congress, strongly calls for this Court to grant the petition for writ of certiorari herein.

CONCLUSION

Plaintiff-Fishermen respectfully submit that the new "Recreational Use Exclusion" from public navigation is fundamentally at odds with the long-standing authorities that create and protect the public's right to recreationally use navigable waters of America, and this fundamental conflict – denying basic navigational rights to the American public – compels this Honorable Court to grant the writ of certiorari to fully review the judgment and holding of the Circuit Court below.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-31045

NORMAL PARM, JR.; HAROLD EUGENE WATTS; ROY MICHAEL GAMMILL; WILLIAM T. ROGERS; ROBERT ALLEN BALCH

Plaintiffs-Appellants

v.

MARK SHUMATE, in his official capacity as Sheriff of East Carroll Parish

Defendant-Appellee

Appeals from the United States District Court for the Western District of Louisiana

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(Filed Dec. 28, 2007)

Before KING, GARZA and BENAVIDES, Circuit Judges.

KING, Circuit Judge:

Plaintiffs-appellants Normal Parm, Jr., Harold Eugene Watts, Roy Michael Gammill, William T. Rogers, and Robert Allen Balch ("Plaintiffs"), recreational fishermen, appeal the district court's denial of their summary judgment motion and the grant of the

cross-motion for summary judgment by defendant-appellee East Carroll Parish Sheriff Mark Shumate ("Sheriff Shumate"). Plaintiffs brought their claims against Sheriff Shumate under 42 U.S.C. § 1983, alleging that they were falsely arrested for trespass when they refused to cease fishing on waters covering ordinarily dry, private property (the "Property") owned by Walker Cottonwood Farms, L.L.C., successor-in-title to Walker Lands, Inc. (collectively "Walker"). Plaintiffs argue that Sheriff Shumate lacked probable cause to arrest them for fishing on the Property because the public has a federal and state right to fish on the Property when it is submerged under the Mississippi River. Because we disagree, we AFFIRM the district court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

The underlying dispute in this case began over a decade ago, and the facts have been considered in various forms by multiple courts, including this one. Plaintiffs are lifelong boaters, hunters, and fisherman who fish on the Mississippi River in East Carroll Parish and other river parishes in northeast Louisiana. The water levels of the Mississippi River fluctuate seasonally. In East Carroll Parish, the normal low water mark is seventy-seven feet above mean sea level. Yet during the spring season the river floods well beyond its normal channel – as a result of increased rainfall and snow melt in the North – and the river regularly rises to as high as one hundred and

twelve feet above mean sea level. It is normal for the river to remain at this level for at least two months.

The Property is located in East Carroll Parish. On its eastern side, the Property is bound by the Mississippi River, and on its western side, it is bound by the Mississippi River's levees. Buildings, crop lands and forests, with trees as tall as one hundred and forty feet, are located on the Property. In addition, waterways known as Gassoway Lake, Little Gassoway Lake, and other bodies of water are contained within its boundaries. Gassoway Lake, which Plaintiffs consider the most ideal venue for fishing on the Property, is located on the Property's western side, nearly three-and-a-half miles from the ordinary low water mark of the Mississippi River and its channel. Gassoway Lake is connected by a man-made drainage ditch to Bunch's Cutoff, which, in turn, flows into the Mississippi River. When the river floods in the spring, Gassoway Lake, along with the rest of the Property, is submerged under its waters.

Plaintiffs have fished the waters of Gassoway Lake when it was flooded by the Mississippi River, even though they knew that Walker objected to their presence. In 1996, Walker began filing complaints with Sheriff Shumate against boaters fishing on Gassoway Lake. Sheriff Shumate responded by arresting Plaintiffs, and others found on the Property,

for trespass.[1] While admitting that they did not have Walker's permission, Plaintiffs claimed that they were entitled to fish on the Property when it was flooded because Gassoway Lake was either: (1) owned by the State of Louisiana on behalf of the public; or (2) subject to state and federal servitudes.

The Attorney General for the State of Louisiana agreed with Plaintiffs' position and issued Louisiana Attorney General Opinion No. 96-206, concluding that channels of the Mississippi River traversed the Property and were "river bed" owned by the State. His opinion stated that "Lake Gassoway is a naturally navigable body of water under both State and Federal law and actually supports navigation for such purposes as hunting, fishing, [and] trapping. . . . " He also determined that the Property was subject to a public servitude. Notwithstanding this opinion, Sheriff Shumate continued to arrest fishermen found on the Property. However, the East Carroll Parish District Attorney, James "Buddy" Caldwell, informed Sheriff Shumate that he did not intend to prosecute any of the Plaintiffs for trespass until the ownership and public servitude issues were resolved. To this day, Plaintiffs have not been prosecuted.

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[1] Specifically, they were arrested for violating LA. REV. STAT. ANN. § 14:63(B), which states: "No person shall enter upon immovable property owned by another without express, legal, or implied authorization."

On June 10, 1996, Walker filed suit in Louisiana state court against the East Carroll Police Jury, seeking a declaration that it owned the Property and an injunction prohibiting members of the public from entering without permission. *Walker Lands, Inc. v. Louisiana,* No. 17,746, slip op. at 1-2 (La. 6th Dist. Ct., May 1, 2003). The state trial court issued a temporary restraining order prohibiting the Police Jury, and all other persons or government agencies, from entering Gassoway Lake without permission for any purpose, including boating, fishing, or hunting. *Id.* at 2. The Police Jury filed a third-party demand against the State of Louisiana. The State was added as an indispensable party, and the Police Jury was eventually dismissed. *Id.* On March 16, 1998, the court granted Walker's motion for summary judgment and issued a permanent injunction. *Id.* The State appealed to the Second Circuit Court of Appeal of Louisiana, which reversed, holding that the issues could not be resolved on summary judgment. *Id.*; *Walker Lands, Inc. v. East Carroll Parish Police Jury,* No. 31,490, slip op. at 5 (La. Ct. App., March 5, 1999).

On December 17, 2001, with the state trial court yet to issue a final decision, Plaintiffs filed this case in federal district court. Plaintiffs alleged that Sheriff Shumate lacked probable cause to arrest them in light of the opinion of the State Attorney General and the decision of the Second Circuit Court of Appeal. They claimed that:

> Until there is rendered a final judgment in the litigation pending in the Sixth District

> Court between [Walker] and the State of Louisiana, there is not sufficient legal evidence to prove, beyond a reasonable doubt, that the use of the naturally and regularly navigable waters of the Mississippi River, including those navigable waters that include Gassoway Lake, Little Gassoway, the old channel and Bunch's Cut-Off, results in a criminal trespass of the land of [Walker,] so long as the Plaintiffs utilize naturally occurring, navigable waters of the Mississippi River.

Plaintiffs sought damages for false arrest under 42 U.S.C. § 1983 and an injunction prohibiting further arrests for fishing on the Property until a "final judgment is rendered by a court of competent jurisdiction, specifying the ownership and navigational rights of the State of Louisiana and [Walker] relative to the [Property] . . . during normal water heights. . . ."

On June 4, 2002, Plaintiffs filed a motion for summary judgment, and on July 8, 2002, Sheriff Shumate filed a cross-motion for summary judgment or, in the alternative, a motion to stay the case pending resolution of the state court proceedings. Both motions were referred to a magistrate judge for a report and recommendation. Because there was a "reasonable probability that the state courts [might] find the waters at issue to be navigable and thus public," the magistrate judge held that a federal decision in this case could be obviated by the state proceeding. The district court adopted the report and

recommendation, stayed the federal case, and Plaintiffs appealed. In an unpublished decision, we agreed that the questions of Louisiana law, then pending in a Louisiana court, might "render it unnecessary for federal courts to decide the constitutional issues presented in this case[,]" and affirmed the district court's stay. *Parm v. Shumate,* No. 02-31183, slip op. at 6 (5th Cir. June 16, 2003).

On May 1, 2003, the state trial court ruled that Walker owned the Property and had the right to exclude the public from it. *Walker Lands,* No. 17,746, slip op. at 1; *see also Walker Lands, Inc. v. East Carroll Parish Police Jury,* 871 So.2d 1258, 1261 (La. Ct. App. 2004). The court first noted that it was undisputed that the Property was either woodland or farmland in 1812, the year that Louisiana was admitted to the Union as a State.[2] *Walker Lands,* No. 17,746, slip. op. at 1; *Walker Lands,* 871 So.2d at 1261. It found that during the 1860s and 1870s, the Mississippi River slowly but gradually shifted westward and submerged the Property. *Walker Lands,* No. 17,746, slip op. at 1; *Walker Lands,* 871 So.2d at 1261. When the river subsequently shifted back eastward, it left behind a swale – a shallow depression in the land – which became Gassoway Lake through alluvion or

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[2] Bodies of water formed before 1812 are owned by the State. *See Dardar v. Lafourche Realty Co., Inc.*, 985 F.2d 824, 826-27 (5th Cir. 1993).

accretion.[3] *Walker Lands,* No. 17,746, slip op. at 11-12; *Walker Lands,* 871 So.2d at 1261. Gassoway Lake and the other natural bodies of water on the Property were formed before 1910, when private landowners purchased it. *Walker Lands,* No. 17,746, slip op. at 11; *Walker Lands,* 871 So.2d at 1261. Moreover, the court determined that none of the waters on the Property were navigable. But for the man-made drainage ditch connected to Bunch's Cutoff and other structures, the court held, Gassoway Lake itself would be non-existent during the summer months. *Walker Lands,* No. 17,746, slip op. at 12-13. Since the waters lying on the Property were not navigable in fact, the trial court entered a permanent injunction prohibiting the public-at-large from going on Gassoway Lake, or on the land between Gassoway Lake and the Mississippi River. *Walker Lands,* No. 17,746, slip op. at 12-14; *Walker Lands,* 871 So.2d at 1262-63.

The State appealed the trial court's decision to the Second Circuit Court of Appeal, which affirmed in part and reversed in part. *Walker Lands,* 871 So.2d at 1268-69. The appellate court accepted the trial court's findings of fact and held that the Property was privately owned. The court rejected the State's argument

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[3] Alluvion and accretion are used synonymously to describe the addition of soil by gradual deposit. *Walker Lands,* 871 So.2d at 1264 n.13. Under Louisiana law, "[a]ny alluvion . . . which forms along the banks of a river belongs to the riparian landowners who own the land adjacent to the river, when the river shifts course." *Id.* at 1264 (citations omitted).

that the Property was the bed of the Mississippi River – and therefore owned by the State – because a river's bed consists only of the land lying below the river's ordinary low water mark. *Id.* at 1262 n.7. It did not matter that the Mississippi River sometimes flooded the Property. *Id.* at 1264.

> Privately owned land does not become part of a navigable body of water when a nearby navigable body of water overflows its normal bed and temporarily covers the property. Gassoway Lake is landlocked and does not now lie in the bed of the Mississippi river, which is some three and one-half miles to the east; likewise, it is not a channel of the river, since it is cut off from it.

Id. (citations omitted). In addition, the court held that Gassoway Lake was not a navigable body of water owned by the State because it was not a navigable body of water in fact. *Id.* at 1265-66.

Nevertheless, the Second Circuit Court of Appeal lifted the state trial court's injunction because Walker lacked standing to seek relief against a hypothetical public-at-large. *Id.* at 1267. The court stated that while "[o]wners of private property may forbid entry to anyone for purposes of hunting or fishing and the like[,]" Walker could only ask for relief against a specific individual after that person had invaded the Property. *Id.* The court declined to resolve whether there was a public servitude on the Property during the Mississippi River's peak stage. It observed that under Louisiana law, the bank of the Mississippi

River consists of all the land lying between its ordinary low and high water marks, which includes all of the Property, and noted that a public servitude preserves a river's bank for the public's navigational use. *Id.* at 1268 & n.16. And while it stated that "[f]ishing and hunting on flooded lands do not meet the definition of using the bank of a river at its high water mark for a navigational purpose[,]" *id.* at 1268 n.6 (citations omitted), it "pretermit[ted] discussion" of the issue because the State had not properly raised it, *id.* at 1268.

On June 3, 2005, the Second Circuit Court of Appeal's decision became final when the Louisiana Supreme Court denied the State's application for a writ of certiorari. In light of the conclusion of the state court proceedings, on August 16, 2005, the district court lifted the stay in this case. The court ordered the parties to file supplemental briefs in support of their cross-motions for summary judgment and referred the matter to a magistrate judge for a report and recommendation. Sheriff Shumate filed briefs arguing that: (1) the case was moot because Plaintiffs merely sought relief "until the Second Circuit rules"; (2) there is no federal or state right to fish on private property above the Mississippi River's ordinary low mark; and (3) even if there was such a right, he was entitled to qualified immunity because it was not a clearly established constitutional right. Plaintiffs, on the other hand, argued that they were entitled to summary judgment because there is both a state and federal right to fish on the Property when it

is submerged under the Mississippi River. They asserted that the case was not moot because their complaint sought damages for false arrest and an injunction, not just until the state proceeding was complete, but until the public's "navigational rights" were determined. Finally, they contended that Sheriff Shumate was not entitled to qualified immunity because he was not being sued in his personal capacity.

On April 21, 2005, the magistrate judge issued his report and recommendation. He rejected Sheriff Shumate's alternative arguments, stating that: (1) the case was not moot because the state appellate court expressly pretermitted ruling on the issue of navigational rights; and (2) Sheriff Shumate was not entitled to qualified immunity because the case was not brought against him in his personal capacity. Turning to the fundamental question in the case, the magistrate judge held that no federal statute authorized Plaintiffs to fish on the Property, nor did the "federal navigational servitude," which is derived from the Commerce Clause of the United States Constitution, grant persons the right to fish on navigable waters. However, the magistrate judge determined that federal common law *did* create a right to fish on navigable waters, and that this public right burdens the Property when it is submerged under the waters of the Mississippi River. Similarly, the magistrate judge held that Louisiana law grants to the public the right to use – including for purposes of

fishing – the "running waters" found in the State, regardless of the river's stage.

On August 29, 2006, the district court adopted the report and recommendation in part. It agreed that neither federal statutes nor the federal navigational servitude provides Plaintiffs with the right to fish on the Property. The district court disagreed, however, with the magistrate judge's determination that federal common law and state law granted such a right. The district court stated that while this court has recognized a public right to reasonably use navigable waters, we have not found a right to fish on private lands. Moreover, although the district court found that the Property is a bank of the Mississippi River under Louisiana law and subject to a state servitude, the servitude "is limited to activities that are incidental to the navigable character of the Mississippi River and its enjoyment as an avenue of commerce. . . . [F]ishing and hunting are not included in these rights." Accordingly, the district court found that Sheriff Shumate had probable cause to arrest Plaintiffs for trespass and entered summary judgment on Sheriff Shumate's behalf.

This timely appeal followed.

II. DISCUSSION

We review a grant of summary judgment de novo, viewing all the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *See Crawford v.*

Formosa Plastics Corp., 234 F.3d 899, 902 (5th Cir. 2000). "Summary judgment is proper when the evidence reflects no genuine issues of material fact and the non-movant is entitled to judgment as a matter of law." *Id.* (citing FED. R. CIV. P. 56(c)). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In order to prevail in a § 1983 claim for false arrest, a plaintiff must show that he was arrested without probable cause in violation of the Fourth Amendment. *Brown v. Lyford,* 243 F.3d 185, 189 (5th Cir. 2001) (citations omitted). In a suit brought against a municipal official in his official capacity, the plaintiff must show that the municipality has a policy or custom that caused his injury. *Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985); *Monell v. N.Y. City Dept. of Soc. Servs.*, 436 U.S. 658, 689 (1979). If a municipal officer who has authority to establish final municipal policy makes a decision or orders a course of action, the municipality may be held liable for the officer's decision or order. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480-82 (1986); *see also Turner v. Upton County, Texas,* 915 F.2d 133, 136 (5th Cir. 1990) (holding that the municipality may be held liable for the illegal or unconstitutional actions of its final policy-makers as they engage in the setting of goals and the determination of how those goals will be achieved).

In this case, Sheriff Shumate does not argue that he lacked final policy-making authority. Nor does he continue to argue that he is entitled to qualified immunity, accepting Plaintiffs' assertion that they do not seek to hold him liable in his individual capacity. The key issue, therefore, is whether Plaintiffs have either a federal or state right to fish on the Property in the spring during the Mississippi River's normal flood stage. If they do not, Sheriff Shumate had probable cause to arrest them for trespass and was entitled to prevail on summary judgment.

A. Federal Rights

Plaintiffs argue that they have a federal right to fish on the Property when it is covered by the Mississippi River's waters because the Mississippi River is a navigable waterway of the United States. They contend that a federal navigational servitude burdens the Property, creating a public right to fish there. Plaintiffs also assert that there is a corresponding federal common law right to fish on the navigable waters of the United States. In response, Sheriff Shumate argues that: (1) the Property is not burdened by any federal easements because the Property is not a navigable waterway in fact; (2) the federal navigational servitude does not create a right to fish; and (3) there is no federal common law affecting riparian land owners' property interests.

It is well established that the Commerce Clause of the United States Constitution gives the federal

government a "dominant servitude" over the navigable waters of the United States. *United States v. Cherokee Nat. of Okla.,* 480 U.S. 700, 704 (1987) (citation omitted). The so-called navigational servitude extends "laterally to the entire water surface and bed of a navigable waterway, which includes all the land and waters below the ordinary high water mark." 33 C.F.R. § 329.11(a); *see also United States v. Rands,* 389 U.S. 121, 123 (1967). A river's ordinary high water mark is set at "the line of the shore established by the fluctuations of water. . . ." 33 C.F.R. § 329.11(a)(1). It is ascertained by "physical characteristics such as a clear, natural line impressed on the bank; . . . changes in the character of the soil; destruction of terrestrial vegetation; . . . or other appropriate means that consider the characteristics of the surrounding areas." *Id.* The navigational servitude does not burden land that is only submerged when the river floods. *Oklahoma v. Texas,* 260 U.S. 606, 632 (1923); *United States v. Harrell,* 926 F.2d 1036, 1041-43 (11th Cir. 1991); *United States v. Claridge,* 416 F.2d 933, 934 (9th Cir. 1970).[4]

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[4] Plaintiffs argue that the Property is below the high water mark based on the Second Circuit Court of Appeal's finding that the high water mark is one hundred and twelve feet above mean sea level (the high water mark during the spring flooding season). The explanation for the Louisiana court's conclusion is that Louisiana has rejected the federal definition of high water mark and relies, instead, on the ordinary seasonal flood levels. *DeSambourg v. Bd. of Comm'rs for the Grand Prairie Levee Dist.,* 621 So.2d 602, 612 (La. 1993). Unfortunately, neither party

(Continued on following page)

As implied by its very name and the constitutional provision from which it arises, the federal navigational servitude is concerned with *navigational* rights and *commerce*. *See United States v. Montana,* 450 U.S. 544, 551 (1981) ("The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce."); *Kaiser Aetna v. United States,* 444 U.S. 164, 177 (1979) ("The navigational servitude . . . gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce."); *United States v. Chi. M., St. P. & P.R. Co.,* 312 U.S. 592, 596 (1941) ("[T]he rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation.") (citing *Gibson v. United States,* 166 U.S. 269, 272 (1897)). Neither navigation nor commerce encompass recreational fishing. *See Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 482-84 (1988) (noting that fishing is not related to navigability); *George v. Beavark, Inc.,* 402 F.2d 977, 981 (8th Cir. 1968) ("Although the rule on navigability has been at times liberalized, to our

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submitted sufficient summary judgment evidence to determine where the federal high water mark lies, although it is unlikely that it includes much of the Property. *See United States v. Harrell,* 926 F.2d at 1043 ("To argue that the government's jurisdiction should extend laterally as much as three miles on either side of the Tombigbee river is ludicrous.").

knowledge none of the authoritative cases has liberalized the rule so as to indicate that mere pleasure fishing on a stream of water is such usage as would constitute navigability."). Accordingly, the navigational servitude does not create a right to fish on private riparian land.

Moreover, Plaintiffs' claim to a federal right ignores "the 'general proposition [that] the law of real property is, under our Constitution, left to the individual States to develop and administer.'" *Phillips Petroleum,* 484 U.S. at 484 (citation omitted). Louisiana took title to all lands below navigable waters in its boundaries when it was admitted to the Union. *Dardar,* 985 F.2d 824, 826-27 (citation omitted); *see also Texas v. Louisiana,* 410 U.S. 702, 714 (1973); *Utah v. United States,* 403 U.S. 9, 10 (1971); *Pollard's Lessee v. Hagan,* 44 U.S. 212, 230 (1845). It has broad authority to regulate public trust lands, including the Property, as it sees fit. *See Phillips Petroleum,* 484 U.S. at 482-84. Louisiana may regulate or prohibit the use of land held in public trust. *See McCready v. Virginia,* 94 U.S. 391, 395 (1876) (upholding a state statute that prohibited non-state citizens from planting oysters in tidal lands); *Smith v. Maryland,* 59 U.S. 71, 74-75 (1855) (upholding a state statute that prohibited a federally licensed ship from dredging for oysters in the Chesapeake Bay). It may "retain[ ] for the general public the right to fish, hunt, or bathe on these lands." *Phillips Petroleum,* 484 U.S. at 482-84. Or, as it did here, it may relinquish title to a private landowner. *Id.* at 483; *see also Dardar,* 985 F.2d at

830 (stating that Louisiana may relinquish lands that are periodically overflown by the waters of the Mississippi). In any event, as things now stand, the right to fish on public trust lands is governed by Louisiana law, and there is no reason for us to displace that law by adopting a federal rule of decision in this context.[5] *See Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (stating that it is for Congress to decide whether latent federal power should be exercised to displace state law).

B. State Navigational Servitude

Plaintiffs argue that a state servitude burdens the Property and grants them the right to fish upon it when it is flooded. Plaintiffs assert that this right exists in the Louisiana Constitution, which provides that the freedom to hunt, fish, and trap wildlife is a valued natural heritage that will be forever preserved. *See* LA. CONST. art. I, § 27. They also find support in the Louisiana Civil Code, which provides

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[5] Plaintiffs argument to the contrary based on purported federal common law is unavailing. Plaintiffs point us to state court decisions that provide citizens with a state right to fish on navigable waters. But those cases merely prove that states generally regulate the use of public trust lands. Plaintiffs also rely on *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356, 359 (5th Cir. 1931), where we stated that the owner of the bed of a navigable body of water in Florida could not enjoin the public from using the waters "for boating or sailing for pleasure." But again, *Silver Springs* is inapplicable because it applied state law to determine the scope of navigational rights. *Id.*

that everyone has the right to fish in the State's rivers. *See* LA. CIV. CODE ANN. art. 452. Finally, they contend that the Property is burdened by the State for the public's use because Louisiana owns all of the running waters in the State. *See id.* art. 456. In response, Sheriff Shumate argues that the right to fish in Louisiana is explicitly limited to public lands and does not extend to private riparian property. Moreover, he argues that the Second Circuit Court of Appeal, while failing to hold that the Property is free of a state servitude because the issue was not properly raised, left a "guide post" for this court by noting in passing that the public does not have a right to fish on private lands. We agree with Sheriff Shumate.

First, the Louisiana Constitution, far from creating a private right to fish on the Property, explicitly reserves to private property owners the right to refuse consent to fishermen's entry on their land. The article Plaintiffs rely on reads:

> The freedom to hunt, fish, and trap wildlife, including all aquatic life, traditionally taken by hunters, trappers and anglers, is a valued natural heritage that shall be forever preserved for the people. . . . Nothing contained herein shall be construed to authorize the use of private property to hunt, fish, or trap without the consent of the owner of the property.

See LA. CONST. art. I, § 27.[6] When the article is read in full, it is plain that the right to fish is circumscribed and does not extend to waters on private property.

Second, the Louisiana Civil Code does not create a right to fish upon the Property, even if we assume that the Property in its entirety is a bank of the Mississippi River. Under Louisiana law, the "banks of navigable rivers are private things that are subject to public use." LA. CIV. CODE ANN. art. 452; *see also Buckskin Hunting Club v. Bayard,* 868 So.2d 266, 275-76 (La. Ct. App. 2004). The public use, however, is limited to use for navigational purposes. *Walker Lands,* 871 So.2d at 1268 n.6 (citations omitted); *Buckskin Hunting Club,* 868 So.2d at 14 (citation omitted). As stated in the comments to article 456, "[a]ccording to well-settled Louisiana jurisprudence, which continues to be relevant, the servitude of public use under this provision is not 'for the use of the public at large for all purposes' but merely for purposes that are 'incidental' to the navigable character of the stream and its enjoyment as an avenue of commerce." LA. CIV. CODE ANN. art. 452 cmt. b (citations omitted). The Second Circuit Court of Appeal noted, in the parallel state proceeding, that fishing on

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[6] This section of the Louisiana Constitution did not become effective until December 7, 2004. We, therefore, do not cite it for the proposition that Sheriff Shumate had probable cause to arrest Plaintiffs, but to show that the hortatory passage Plaintiffs rely on is limited in nature.

the banks of the Mississippi River does not meet the definition of a navigational use. *Walker Lands,* 871 So.2d at 1268 n.6 (citations omitted). We agree. *See, e.g., State v. Barras,* 602 So.2d 301, 305 (La. Ct. App. 1992) (holding that fishing was not incidental to navigation); *Edmiston v. Wood,* 566 So.2d 673, 675-76 (La. Ct. App. 1990) (same).

Finally, we reject Plaintiffs' argument that they have the right to fish on the Property when it is submerged under the Mississippi River because "running waters" are public things owned by the State. Under Louisiana law, "public things" belong to the State, and "public things" include "running waters." LA. CIV. CODE ANN. art. 456. Plaintiffs argue that the public has a right to fish on the running waters of the State based on *Chaney v. State Mineral Bd.,* 444 So.2d 105 (La. 1983). In that case, the Louisiana Supreme Court stated that the running waters over non-navigable streams are preserved for the general public. *Id.* at 109. This court has since determined that claims to the use of waterways based on *Chaney* have "failed to carry the day in Louisiana courts." *Dardar,* 985 F.2d at 834 (citation omitted). We have no reason to deviate from that holding. To the contrary, the Third Circuit Court of Appeal of Louisiana recently stated that although an owner must permit running waters to pass through his estate, Louisiana law "does not mandate that the landowner allow public access to the waterway." *Buckskin Hunting Club,* 868 So.2d at 274.

III. CONCLUSION

For the reasons stated above, we AFFIRM the district court's judgment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORMAL PARM, JR., ET AL	**CIVIL ACTION NO. 01-2624**
VERSUS	**JUDGE ROBERT G. JAMES**
MARK W. SHUMATE	**MAG. JUDGE JAMES D. KIRK**

RULING

(Filed Aug. 29, 2006)

Pending before the Court are a motion for partial summary judgment [Doc. No. 5] filed by the Plaintiffs[1] and cross-motion for summary judgment or in the alternative motion for abstention [Doc. No. 11] filed by Defendant Sheriff Mark W. Shumate of East Carroll Parish ("Sheriff Shumate").

On April 21, 2006, Magistrate Judge James D. Kirk issued a Second Report and Recommendation [Doc. No. 82] recommending that the Plaintiffs' motion for partial summary judgment be granted in part and denied in part. Magistrate Judge Kirk also

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[1] The Plaintiffs in this matter include Normal Parm, Jr., Harold Eugene Watts, Roy Michael Gammill, William T. Rogers, and Robert Allen Balch.

recommended that Sheriff Shumate's cross-motion for summary judgment be denied.[2]

On May 5, 2006, the Plaintiffs filed an objection [Doc. No. 91] to the Second Report and Recommendation. On May 11, 2006, Sheriff Shumate also filed an objection [Doc. No. 95]. Both parties filed responses to each other's objections [Doc. Nos. 99 and 100].

On May 30, 2006, Walker Cottonwood Farms, LLC ("Walker Cottonwood Farms"), successor in title to Walker Lands, Inc. ("Walker Lands"), filed an amicus curiae brief [Doc. No. 102] in support of Sheriff Shumate's objections to the Second Report and Recommendation.

On June 28, 2006, an amicus curiae brief [Doc. No. 116] was filed by numerous fishing organizations in support of the Plaintiffs' objections to the report.[3]

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[2] Magistrate Judge Kirk recommended in his First Report and Recommendation [Doc. No. 22] that Defendant's cross-motion for summary judgment should be granted to the extent that the case should be abstained pending resolution of the state court proceedings.

[3] These organizations include the Louisiana Crawfish Producers Association, Arkansas State Bass Federation, Big Sun Bass Masters of Bellview Florida, Maple Bassmasters of Florida, Blackhawk Bassmasters of Illinois, Bardstown Bassmasters of Kentucky, Kentucky State Bass Federation, Louisiana State Bass Federation, Louisiana Wildlife Federation, Rowa of Louisiana, Minnesota State Bass Federation, River Rats Bassmasters of Minnesota, Mississippi Bass Federation Nation,

(Continued on following page)

On July 27, 2006, an amicus curiae brief [Doc. No. 134] was filed by the Edward Wisner Donation in support of Sheriff Shumate's objections to the report.

For the following reasons, the Court ADOPTS IN PART AND DECLINES TO ADOPT IN PART the findings and conclusions set forth in the Magistrate Judge's Report and Recommendation.

I. FACTS AND PROCEDURAL HISTORY[4]

The Plaintiffs bring this instant action against Sheriff Shumate seeking a declaratory judgment, injunctive relief, and damages under 42 U.S.C. § 1983 and Louisiana state law. The Plaintiffs sued Sheriff Shumate in his official capacity claiming that they were arrested without probable cause for fishing and hunting on waters of the Mississippi River, which

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Western Main Anglers, Yankee Bassers Bass Club of Maine, and the Pennsylvania Bass Federation, Inc.

[4] Magistrate Judge Kirk has already succinctly characterized the facts and procedural history of this case in his Second Report and Recommendation. The Court will incorporate portions of Magistrate Judge Kirk's factual background and procedural history in this Ruling.

covered Walker Cottonwood Farms'[5] property during periodic flooding.[6]

On August 22, 2002, Magistrate Judge Kirk issued his first Report and Recommendation [Doc. No. 22] recommending that this case be stayed pending the outcome of state court litigation in *Walker Lands, Inc. v. East Carroll Parish Police Jury,* 38,367-CA (La. App. 2 Cir. 4/14/04); 871 So.2d 1258 ("*Walker Lands*"). On October 29, 2002, this Court adopted Magistrate Judge Kirk's Report and Recommendation and stayed the case. [Doc. No. 27]. On July 9, 2003, the United States Court of Appeals for the Fifth Circuit affirmed this Court's decision to stay the case. [Doc. No. 32].

A. State Court Decision

In the *Walker Lands'* case, Walker Lands originally filed suit against the East Carroll Parish Police Jury to enjoin all public use of Gassoway Lake and a drainage ditch that runs from the southern end of Gassoway Lake to Bunch's Cutoff, a large body of water that connects with the Mississippi River. The

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[5] Walker Cottonwood Farms is successor in title to Walker Lands' property. However, the record is unclear as to when Walker Cottonwood Farms obtained title to Walker Lands' property.

[6] For purposes of this Ruling, Walker Cottonwood Farms' property includes Gassoway Lake, "the drainage ditch," Little Gassoway Lake, Doe Lake, and Bunch's Cutoff (to the extent it lies within the State of Louisiana).

State of Louisiana ("the State") was added as an indispensable party. The State answered, claiming ownership or, alternatively, a servitude on the disputed lands.[7] Walker Lands also claimed ownership of the disputed lands.

On appeal, the Louisiana Second Circuit Court of Appeal ("Second Circuit") affirmed the trial court's findings that Gassoway Lake was formed when the Mississippi River first moved westward in the 1860's and 1870's and then slowly moved back eastward forming Gassoway Lake in a shallow swale by 1894. *Walker Lands*, 871 So.2d at 1261-62. The court also concluded that, presently, the Mississippi River's ordinary low water mark is 77 feet and its ordinary high water mark is 112 feet at the area in question.[8] *Id.* at 1262. In addition, the court found that Gassoway Lake and surrounding property "only receives water when the Mississippi River floods, which causes water to run through the ditch and eventually [spill] over into the lake." *Id.*

The Second Circuit did not accept the State's argument that Gassoway Lake and the drainage ditch are navigable. The Second Circuit concluded that Gassoway Lake and the surrounding land are located approximately three and a half miles west of

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[7] The East Carroll Parish Police Jury was later dismissed from the lawsuit.

[8] Magistrate Judge Kirk noted that Gassoway Lake's normal elevation is approximately 95 feet. [Doc. No. 82, p. 7].

the Mississippi River, the property remains "completely dry for most of the year, making it unusable," and the property serves no useful commercial purpose. *Id.* at 1265-66. Ultimately, the Second Circuit held that Walker Lands owns Gassoway Lake, the drainage ditch, and other surrounding lands adjacent to the Mississippi River because the property is not "navigable in fact; and, thus, not navigable in law." *Id.* at 1262.[9]

B. Second Report and Recommendation

Following the Second Circuit's decision, this Court re-opened these proceedings. In the Plaintiffs' motion for partial summary judgment, they argue that Sheriff Shumate lacks probable cause to arrest them for trespass under La. Rev. Stat. § 14:63 while they are on the waters of the Mississippi River when those waters cover Walker Cottonwood Farms' property. The Plaintiffs also seek a declaration that Sheriff Shumate lacks sufficient evidence to support a verdict of guilty beyond a reasonable doubt that the Plaintiffs are guilty of trespass. Additionally, the Plaintiffs seek a permanent injunction against Sheriff Shumate, enjoining him from arresting the Plaintiffs

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[9] The state court decision in *Walker Lands* became final after the Louisiana State Supreme Court denied writ on June 3, 2005, and a motion for rehearing on November 28, 2005. *See Walker Lands, Inc. v. East Carroll Parish Police Jury*, 903 So.2d 442 (La. 2005) and *Walker Lands, Inc. v. East Carroll Parish Police Jury*, 916 So.2d 127 (La. 2005).

and other persons for trespass on the lands of Walker Cottonwood Farms when the waters of the river cover that property. In Sheriff Shumate's cross-motion for summary judgment, he asks that the Plaintiffs' claims be dismissed and asserts the defense of qualified immunity.

In the Second Report and Recommendation, Magistrate Judge Kirk found that the Plaintiffs have both a federal common law right and a state law right to fish and hunt on the Mississippi River between the ordinary high and low water mark regardless of the status of the ownership of the property located below the waters.[10]

Applying federal law, Magistrate Judge Kirk first found that neither 33 U.S.C. § 10 nor the federal navigational servitude provides the Plaintiffs with the right to fish and hunt on the Mississippi River. However, Magistrate Judge Kirk did find that the Plaintiffs have a federal common law right of navigation "which includes the right to reasonably use the Mississippi's waters for the purposes, among other things, of navigation including travel and transportation, commerce, boating, sailing, and fishing and hunting from boats," up to the ordinary high water mark, regardless of who owns the land beneath the waters. [Doc. No. 82, p. 14].

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[10] Federal law defines high water mark differently than state law. *See* 33 C.F.R. § 329.11. The different definitions, however, do not substantively change the Court's analysis.

Applying state law, Magistrate Judge Kirk also found that the Plaintiffs have a right to fish and hunt on the Mississippi River up to the ordinary high water mark, when the waters cover privately owned banks of the Mississippi River.

Based on these conclusions, Magistrate Judge Kirk then determined that Sheriff Shumate did not have probable cause to arrest the Plaintiffs under La. Rev. Stat. 14:63 for trespass on Walker Cottonwood Farms' property when it is covered by the Mississippi River between the ordinary high and low water mark.

II. LAW AND ANALYSIS

The Court reviews *de novo* a magistrate judge's report and recommendation if a party files specific, written objections within ten days of service. 28 U.S.C. § 636(b)(1). In the present case, both parties timely filed objections [Doc. Nos. 91 and 95] to the Magistrate Judge's Report and Recommendation, thus warranting *de novo* review by the Court.

First, for the reasons stated in Magistrate Judge Kirk's Second Report and Recommendation, the Court ADOPTS his recommendation to the extent that 33 U.S.C. § 10 and the federal navigational servitude do not provide the Plaintiffs with the right to fish and hunt on the Mississippi River. However, for the reasons discussed below, the Court DECLINES TO ADOPT Magistrate Judge Kirk's recommendation that the Plaintiffs have a federal common law right to fish and hunt on the Mississippi

River, up to the high water mark, when it floods privately owned land.

Second, the Court also ADOPTS Magistrate Judge Kirk's recommendation to the extent that Walker Cottonwood Farms' property is a bank of the Mississippi River and subject to public use up to the ordinary high water mark, as defined by Louisiana law. However, for the reasons discussed below, the Court DECLINES TO ADOPT his recommendation to the extent that he found the Plaintiffs have a right to fish and hunt on the Mississippi River up to the ordinary high water mark when it periodically floods Walker Cottonwood Farms' property.

Third, the Court ADOPTS Magistrate Judge Kirk's recommendation to the extent that Sheriff Shumate is not entitled to qualified immunity. However, for the reasons discussed below, the Court DECLINES TO ADOPT Magistrate Judge Kirk's recommendation to the extent that Sheriff Shumate did not have probable cause to arrest the Plaintiffs under La. Rev. Stat. § 14:63 for trespass on Walker Cottonwood Farms' property when it is covered by the Mississippi River.

The Court also ADOPTS Magistrate Judge Kirk's recommendation to the extent that the Plaintiffs are not entitled to an injunction against Sheriff Shumate enjoining him from enforcing Louisiana trespass laws.

A. Federal Common Law Right

Magistrate Judge Kirk found that a common law right of navigation exists on the Mississippi River, and that this right of navigation includes the right to fish and hunt up to the high water mark.

In support of this conclusion, Magistrate Judge Kirk cited *Silver Springs Paradise Co. v. Ray,* 50 F.2d 356 (5th Cir. 1931), for the general proposition that the public right of navigation "entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common." *Id.* at 359.

The Court disagrees with Magistrate Judge Kirk's finding. Although the Fifth Circuit stated in *Silver Springs* that the public has a right to reasonably use navigable waters for "legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as carrying persons or property for hire," the Fifth Circuit did not specifically find that the public has a federal common law right to fish or hunt on a navigable source of water. Therefore, the Court declines to interpret the Fifth Circuit's decision so broadly as to find that the Plaintiffs have a federal common law right to fish or hunt on a navigable water, such as the Mississippi

River, when those waters periodically flood privately owned lands.

B. State Law Right

In Louisiana, "[t]he banks of navigable rivers or streams are private things that are subject to public use." La. Civ. Code art. 456. "The bank of a navigable river or stream is the land lying between the ordinary low and the ordinary high stage of the water. . . ." *Id.*

Because Walker Cottonwood Farms' property is located between the ordinary high and low water mark established by the Second Circuit, Magistrate Judge Kirk found that it is a bank of the Mississippi River and subject to public use. Magistrate Judge Kirk stated that, "the right to use the river's waters includes the right to use the entirety of the waters, regardless [sic] the river's level or stage or how much of its bank it covers," up to the high water mark. [Doc. No. 82, pp. 20-21].

The Court agrees with Magistrate Judge Kirk's finding to the extent that Walker Cottonwood Farms' privately owned property is subject to public use because it is a bank of the Mississippi River. Such public use, however, is limited to activities that are incidental to the navigable character of the Mississippi River and its enjoyment as an avenue of commerce. The Court finds that fishing and hunting are not included in these rights.

Comment (b) to La. Civ. Code art. 456 states, in pertinent part:

> (b) Article 455(1) of the Louisiana Civil Code of 1870 declares that "everyone has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like". According to well-settled Louisiana jurisprudence, which continues to be relevant, the servitude of public use under this provision is not "for the use of the public at large for all purposes" but merely for purposes that are "incidental" to the navigable character of the stream and its enjoyment as an avenue of commerce.

The Second Circuit and other Louisiana courts have interpreted La. Civ. Code art. 456 to exclude fishing and hunting from the type of public use permitted on flooded private property because these activities do not "meet the definition of using the bank of a river at its high water mark for a navigational purpose." *See Walker Lands,* 871 So.2d at 1268 n.16 (citing *State v. Barras,* 615 So.2d 285 (La. 1993) and *Warner v. Clarke,* 232 So.2d 99 (La. App. 2d Cir. 1970)); *see also Buckskin Hunting Club v. Bayard,* 03-1428 (La. App. 3 Cir. 3/3/04); 868 So.2d 266, 273 (using the banks along navigable rivers is "limited to navigation and not hunting."); *Edmiston v. Wood,* 566 So.2d 673, 675-76 (La. App. 2d Cir. 1990) (fishing and hunting in a boat over flooded private property are not incidental to navigable character of

the stream and its enjoyment as an avenue of commerce).

Therefore, this Court concludes that the Plaintiffs' activities, to the extent they include fishing and hunting, are not permitted on Walker Cottonwood Farms' property, because these activities are not "incidental to the navigable character of the [river] and its enjoyment as an avenue of commerce." La. Civ. Code art. 456 cmt. (b).

C. 42 U.S.C. § 1983 and probable cause

A police officer may arrest a person if the officer has probable cause to believe that person committed a crime. *Tennessee v. Garner,* 471 U.S. 1, 7 (1985); *see also* La. Code Crim. Proc. art. 213.[11] The United States Supreme Court has explained that "probable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo,* 443 U.S. 31, 37 (1979).

Louisiana courts have explained probable cause as the following:

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[11] The constitutional torts of false arrest, unreasonable seizure, and false imprisonment also require a showing of no probable cause. *See Brown v. Lyford,* 243 F.3d 185, 189 (5th Cir. 2001).

> Probable cause to arrest exists when the facts and circumstances within the officer's knowledge are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. . . . The determination of probable cause, although requiring something more than bare suspicion, does not require evidence sufficient to support a conviction. Probable cause, as the very name implies, deals with probabilities. . . . The determination of probable cause, unlike the determination of guilt at trial, does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the available evidence supports a reasonable belief that the person to be arrested has committed a crime. . . . The determination of probable cause involves factual and practical considerations of everyday life on which average men, and particularly average police officers, can be expected to act.

State v. Simms, 571 So.2d 145, 148-49 (La. 1990).

Magistrate Judge Kirk found that Sheriff Shumate arrested the Plaintiffs for trespassing without probable cause "because the sheriff should have known that the plaintiffs were legally authorized to be upon the waters." [Doc. No. 82, p. 28].

The Court disagrees with Magistrate Judge Kirk's finding. As discussed above, the Second

Circuit, La. Civ. Code art. 456, and Louisiana jurisprudence have not allowed fishing or hunting on privately owned banks of navigable waters because these activities are not incidental to the navigable character of the stream and its enjoyment as an avenue of commerce. Therefore, the Court concludes that Sheriff Shumate had probable cause to arrest the Plaintiffs for trespassing in violation of La. Rev. Stat. 14:63.

III. CONCLUSION

Based on the foregoing, the Court ADOPTS IN PART AND DECLINES TO ADOPT IN PART the findings and conclusions set forth in the Magistrate Judge's Second Report and Recommendation [Doc. No. 82].

The Court ADOPTS the Magistrate Judge's recommendation to the extent 33 U.S.C. § 10 and the federal navigational servitude do not provide the Plaintiffs with the right to fish and hunt on the Mississippi River.

The Court also ADOPTS the Magistrate Judge's recommendation to the extent that Walker Cottonwood Farms' property is a bank of the Mississippi River. The Court also ADOPTS the Magistrate Judge's recommendation to the extent that Sheriff Shumate is not entitled to qualified immunity and the Plaintiffs are not entitled to an injunction against Sheriff Shumate enjoining him from enforcing Louisiana trespass laws.

To the extent that Magistrate Judge Kirk found a federal common law right to fish and hunt over the privately owned lands of Walker Cottonwood Farms property when it is periodically flooded by the Mississippi River, the Court DECLINES TO ADOPT the Magistrate Judge's recommendation.

Also, to the extent that Magistrate Judge Kirk found that the Plaintiffs have a state law right to fish and hunt on Walker Cottonwood Farms' property, when it periodically floods from waters of the Mississippi River, the Court DECLINES TO ADOPT the recommendation, and the Plaintiffs' motion for partial summary judgment is DENIED.

To the extent Magistrate Judge Kirk found that Sheriff Shumate lacks probable cause to arrest the Plaintiffs for trespass in violation of La. Rev. Stat. 14:63 for fishing and hunting on privately owned banks of the Mississippi River, the Court DECLINES TO ADOPT the Magistrate Judge's recommendation, and Sheriff Shumate's cross-motion for summary judgment is GRANTED.

MONROE, LOUISIANA this 29th day of August, 2006.

/s/ Robert G. James
ROBERT G. JAMES
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORMAL PARM, JR., ET AL	**CIVIL ACTION NO. 01-2624**
VERSUS	**JUDGE ROBERT G. JAMES**
MARK W. SHUMATE	**MAG. JUDGE JAMES D. KIRK**

JUDGMENT

(Filed Aug. 29, 2006)

For the reasons contained in this Court's Ruling and for the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, to the extent adopted, and after an independent review of the entire record and the written objections filed herein,

The Court ADOPTS IN PART AND DECLINES TO ADOPT IN PART the findings and conclusions set forth in the Magistrate Judge's Report and Recommendation [Doc. No. 82].

IT IS HEREBY ORDERED that the Defendant's cross-motion for summary judgment [Doc. No. 11] is GRANTED.

IT IS HEREBY FURTHER ORDERED that the Plaintiffs' motion for partial summary judgment [Doc. No. 5] is DENIED.

MONROE, LOUISIANA this 29th day of August, 2006.

/s/ Robert G. James
ROBERT G. JAMES
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORMAL PARM, JR., ET AL	**CIVIL ACTION NO. 01-2624**
VERSUS	**JUDGE ROBERT G. JAMES**
MARK W. SHUMATE	**MAG. JUDGE JAMES D. KIRK**

RULING

(Filed Oct. 11, 2006)

Pending before the Court is a Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment filed by Plaintiffs on September 9, 2006 [Doc. No. 141].

On August 29, 2006, the Court issued a ruling ("Ruling") [Doc. No. 139] adopting in part and declining to adopt in part the findings and conclusions set forth in the Magistrate Judge's Report and Recommendation [Doc. No. 82]. The Court also denied the Plaintiffs' motion for partial summary judgment [Doc. No. 5] and granted the Defendant's cross-motion for summary judgment [Doc. No. 11].

On September 21, 2006, Defendant filed a Memorandum in Opposition [Doc. No. 148] to the Plaintiffs' Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment.

On September 21, 2006, Walker Cottonwood Farms, LLC ("Walker") filed an Amicus Brief [Doc. No. 147] in Opposition to the Plaintiffs' Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment.

On September 29, 2006, Plaintiffs filed a Motion for Leave to File Reply Brief [Doc. No. 155] and it was denied by the Court on October 10, 2006.

After reviewing the documents submitted by the parties, the Court is now ready to rule. For the following reasons, Plaintiffs' Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment is DENIED.

I. Standard of Review

The Court may alter or amend a judgment within ten days upon motion by a party under Federal Rule of Civil Procedure 59(e). Fed. R. Civ. P. 59(e). The Court finds that Plaintiffs' motion was served within ten days of the Court's Ruling of August 29, 2006. Accordingly, this motion is governed by Rule 59(e).

The Court has discretion in deciding whether to reopen a case in response to a motion for reconsideration, but must balance the need for the litigation to close and the need to render just decisions based on the facts. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 n.14 (5th Cir.

1994) (*en banc*). Accordingly, a motion seeking review of a grant of summary judgment seeks "an extraordinary remedy that should be used sparingly." *Templet v. Hydrochem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (citing *Clancy v. Employers Health Ins. Co.*, 101 F. Supp. 2d 463, 465 (E.D. La. 2000)).

Under Rule 59(e), the Court is guided by the following factors: (1) whether the judgment was based upon a manifest error of fact or law, (2) the existence of newly discovered or previously unavailable evidence, and (3) an intervening change in controlling law. *See* 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 2810.1 (2d ed. 1995).

II. Analysis

Plaintiffs argue that the Ruling made several factual errors critical to ascertaining the scope of federal and state servitudes, failed to apply binding precedent of the United States Supreme Court and the Fifth Circuit Court of Appeals, and failed to apply binding state legal authority.

A. Factual Error

Plaintiffs challenge the characterization of the disputed Walker Lands as "flooded" when the Mississippi River rises and falls between 77 and 112 feet mean sea level. Plaintiffs contend that flooding occurs when water rises above its normal high water level, here, above 112 feet mean sea level. Plaintiffs

argue this "clear factual error" by the Court is important because the Plaintiffs do not seek to use any of the "flooded" Walker Lands. However, the Ruling correctly focused on the Plaintiffs' rights on land between the normal low and high water mark and thus this mischaracterization (if any) does not affect the disposition.

Plaintiffs also argue the Court failed to distinguish between the river "bed" under federal law and the river "bed" and "bank" under state law, which are defined differently.[1] However, again, the Court correctly focused on the same area of land and water comprised by the federal river bed and state river bed and river bank.

B. Federal Precedent

Plaintiffs claim the Court failed to apply binding federal authority confirming the Plaintiffs' federal right to fish on the Walker Lands. These arguments were appropriately rejected by the Court and therefore do not provide a basis for reconsideration. However, the Court will briefly address several points.

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[1] Under federal law, the public's right to use navigable waters extends across the river "bed" of the navigable waterway, thus extending across the surface of the water laterally up to the normal high water mark. In contrast, under State law this same area is referred to cumulatively as the river bed and the river bank." [Doc. No. 141, p. 6].

The federal common law right of navigation allows the public to use navigable waters for "legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as carrying persons or property for hire." *Silver Springs Paradise Co. v. Ray,* 50 F.2d 356, 359 (5th Cir. 1931). However, the federal common law right of navigation does not provide a basis for the public to fish on navigable waters. *Id.* While Plaintiffs urge the Court to interpret *Silver Springs* broadly, the Court has declined to do so.

Further, the facts in the instant case do not provide a basis to extend the holding in *Silver Springs.* Unlike the submerged land in *Silver Springs* that had a direct connection to the navigable source of water, Gassoway Lake is more than three miles from the Mississippi River and remains landlocked most of the year. *See Walker Lands,* 38, 376-CA, p. 5 (La. App. 2 Cir. 4/14/04); 871 So.2d 1258, 1262. While the Plaintiffs in *Silver Springs* sought access in order to transport persons in boats for commercial purposes, the Plaintiffs here seek access in order to fish for recreational purposes. *Id.* at 1267.

Similarly, the federal navigational servitude under the Commerce Clause, if one were found to exist on the Walker Lands, does not yield a right to fish. *See Blanchard v. Williams,* No. 92-0941 (W.D. La. Sep. 19, 1995), *aff'd,* 98 F.3d 1339 (5th Cir. 1996). In *Blanchard v. Williams,* the Court declined to find a federal right to fish upon the surface of flooded swamplands lying between two navigable water

bodies. The Court reasoned that the scope of the servitude across the surface of the water only permitted uses incident to navigation, not fishing. *Id.* at 11. Moreover, the Court held that "the use of its bed and banks, and particularly public fishery rights therein, remain purely matters of state law." *Id.* at 12.

C. State Precedent

Plaintiffs claim the Court failed to apply binding state authority. Plaintiffs claim the Louisiana Constitution, statutes, and case law preserve a right to fish in the rivers of Louisiana. These arguments were appropriately rejected by the Court in the Ruling and therefore do not provide a basis for reconsideration. However, the Court will briefly address several points.

Article 1, Section 27 of the Louisiana Constitution does preserve a right to hunt and fish. However, this provision also recognizes the authority of the state to regulate such recreational uses and the right of private property owners to exclude users from private property. Therefore, Plaintiffs' argument that the Constitution creates an "inalienable" right to fish, hunt, and trap fails to recognize the intrinsic limits on this right.

The Plaintiffs also argue that, under state law, riparian ownership does not include control of navigable waters (upon which they assert their right to fish). Because they do not assert a right to use the

privately owned dry bank area of a navigable river and seek only the right to use the navigable waters themselves, Plaintiffs argue that the restrictions on bank servitudes in Louisiana Civil Code Article 456 do not apply. Therefore, on a navigable waterway at water levels between the normal low and high water mark, the Plaintiffs claim a right to fish "regardless of who owns the underlying ground."

However, the argument that the restrictions in Article 456 pertain only to "actions that a navigating public might need to do ON DRY GROUND" is without merit. The scope of the bank servitude under Article 456 does not change depending on whether a bank is dry or covered with water. State case law suggests that fishing and hunting are not incidental to navigation.[2] The Court rejects the Plaintiffs' attempts to distinguish this case law under their narrow reading.

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[2] *See Walker Lands*, 871 So.2d at 1268 n.16 (citing *State v. Barras*, 615 So.2d 285 (La. 1993) and *Warner v. Clarke*, 232 So.2d 99 (La. App. 2 Cir. 1970)) (concluding the right to hunt and fish upon water between the river and the levee is unrelated to navigation); *see also Buckskin Hunting Club v. Bayard*, 03-1428, p. 10 (La. App. 3 Cir. 3/3/04); 868 So.2d 266, 273 (finding that use of the banks along navigable rivers is "limited to navigation and not hunting."); *Edmiston v. Wood*, 566 So.2d 673, 675-76 (La. App. 2 Cir. 1990) (finding that fishing and hunting in a boat over flooded private property is not incidental to navigable character of the stream and its enjoyment as an avenue of commerce).

Plaintiffs also argue that their right to fish flows from the navigable character of the water itself and not ownership of the underlying land. The Second Circuit declined to find that Gassoway Lake and the drainage ditch are navigable. Therefore, when the surrounding Walker Lands are periodically inundated, the property, including the water flowing above the land, does not become navigable.

D. CONCLUSION

Louisiana is known as the "Sportsman's Paradise" because of its abundance of recreational opportunities, including fishing. However, access to those recreational opportunities must be balanced against the rights of private property owners. Having carefully considered and rejected the arguments presented by Plaintiffs and failing to find any manifest errors of fact or law, the Court finds that Plaintiffs' Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment is DENIED.

MONROE, LOUISIANA, this 11th day of October, 2006.

/s/ Robert E. James
ROBERT G. JAMES
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORMAL PARM, JR., ET AL	**CIVIL ACTION NO. 01-2624**
VERSUS	**JUDGE ROBERT G. JAMES**
MARK W. SHUMATE	**MAG. JUDGE JAMES D. KIRK**

ORDER

(Filed Oct. 11, 2006)

For the reasons contained in this Court's Ruling,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Rehearing and Reconsideration and Motion for Amendment of Judgment [Doc. NO. 141] is DENIED.

MONROE, LOUISIANA, this 11th day of October, 2006.

/s/ Robert G. James
ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NORMAL PARM Jr., et al CIVIL ACTION 3-01-2624

VERSUS

MARK W. SHUMATE, IN HIS OFFICIAL CAPACITY AS SHERIFF OF EAST CARROLL PARISH

U.S. DISTRICT JUDGE ROBERT G. JAMES

U.S. MAGISTRATE JUDGE JAMES D. KIRK

(Filed Apr. 21, 2006)

SECOND REPORT AND RECOMMENDATION

Before the court is a motion for partial summary judgment by plaintiffs [Doc. #5] and defendant's cross motion for summary judgment and alternative motion for abstention [Doc. #11], both of which are referred to me by the district judge for Report and Recommendation.

This is a suit for declaratory judgment, injunctive relief and for damages under the Civil Rights Act and Louisiana state law. Plaintiffs sue the sheriff of East Carroll Parish in his official capacity only, claiming in a complaint verified by all of the plaintiffs, that the plaintiffs have in the past, and desire in the future, to navigate over, and fish and hunt on, the waters of the Mississippi River, and in areas claimed to be owned by Walker Lands, Inc. (Walker Lands), including Gassoway Lake, Little Gassoway Lake, Bunch's Cutoff, Old River, "the old

channel", "and other miscellaneous and unnamed navigable water areas comprising a portion of the Mississippi River during normal water heights." Normal Parm, Jr., Harold Eugene Watts, Roy Michael Gammill, William T. Rogers and Robert Allen Balch (plaintiffs) claim they are fishermen, hunters and outdoorsmen.

Jurisdiction is founded by plaintiffs on the Civil Rights Act, 42 U.S.C. § 1983 et seq., and the Federal navigation laws found in 33 U.S.C. § 10, et seq., and applicable regulations, 33 C.F.R. § 329.4, the "Federal Navigational Servitude," the Rivers and Harbors Appropriation Act of 1899, and pendant jurisdiction as to the claims founded on state law.

By first Report and Recommendation [Doc. # 22], I found both Pullman type abstention and Colorado River abstention to be applicable and recommended that this case be stayed pending the outcome of state court litigation in *Walker Lands, Inc. and Hollybrook Land Company, Inc. v. East Carroll Parish Police Jury and State of Louisiana,* Civil action number 17, 746, Sixth Judicial District Court, Parish of East Carroll, Louisiana (the Walker Lands case). That case involved allegations as to the ownership of the areas in dispute here as well as questions of navigability. It was anticipated that the case would answer at least some of the issues presented here. U.S. District Judge Robert G. James ordered this case stayed in October 2002 [Doc. #27] and the Fifth U.S. Circuit Court of

Appeals affirmed the ruling based on Pullman type abstention [Doc. #32].[1]

The state court's decision in the Walker Lands case became final after the Louisiana Second Circuit Court of Appeals ruled on April 14, 2004, at 871 So.2d 258 (2d Cir. 2004) and the state Supreme Court denied the sheriff's writ application in June of 2005, at 903 So. 2d 442 (La. 2004). This court then re-opened these proceedings. Following delays caused to some of the attorneys by Hurricane Katrina, all briefs were filed by December 28, 2005. Permission to file an amicus curiae brief was granted to the Waterways Access Association, a non-profit Louisiana corporation whose stated purpose is, among other things, "to protect the citizen's (sic) right to access navigable waterways and the natural overflow; to insure the continuation of the hunting and fishing heritage and other outdoor recreational opportunities of the citizens of the community, region and state . . . ".[2] Some, but not all, of the plaintiffs are members of that association, and that association is plaintiff in a related case pending in this court (see footnote 2) which remains stayed. An amicus curiae brief by Walker Lands was also allowed filed.[3]

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[1] *Parm v. Shumate*, 73 Fed. Appx. 78 (5th C. 2003).

[2] See complaint, Doc. #1, paragraph II., in *Waterways Access Association v. Walker Lands, Inc. and Hollybrook Land Co., Inc.*, docket number 99 cv 1750 on the docket of this court.

[3] Walker Lands has filed evidence attached to its amicus brief. A person granted special amicus status may file a brief as

(Continued on following page)

Plaintiffs, in their motion for summary judgment, ask this court to find the sheriff lacks probable cause to arrest the plaintiffs for trespass under La. R. S. 14:63 while they are on the waters of the Mississippi river, declaring that the sheriff lacks sufficient evidence to support a verdict of guilty beyond a reasonable doubt that plaintiffs are guilty of trespass, and granting a permanent injunction against the sheriff enjoining him from arresting the plaintiffs and other persons while on the disputed area.

The sheriff, in his cross motion, asks that plaintiffs' claims be dismissed and asserts the defense of qualified immunity.

The Law of Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure mandates that a summary judgment:

> "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, [submitted concerning the motion for summary judgment], if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

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allowed by this court's order but may not submit evidence. It is not a party to this case. Therefore, the attachments will not be considered and have been ordered stricken from the record.

Paragraph (e) of Rule 56 also provides the following:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

Local Rule 56.2W also provides that all material facts set forth in a statement of undisputed facts submitted by the moving party will be deemed admitted for purposes of a motion for summary judgment unless the opposing party controverts those facts by filing a short and concise statement of material facts as to which that party contends there exists a genuine issue to be tried. Since plaintiff has not attempted to controvert any of the specific facts stated in the defendant's statement of undisputed facts, those facts will be deemed admitted for purposes of this motion.

A party seeking summary judgment always bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 106 S.Ct. 2548 at 2552; *International Ass'n. of*

Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., Inc., 812 F.2d 219, 222 (5th Cir. 1987). However, movant need not negate the elements of the nonmovant's case. *Litttle v. Liquid Air Corporation,* 37 F.3d 1069 (5th Cir. 1994). Once this burden has been met, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." *Izen v. Catalina* 382 F.3d 566 (5th Cir. 2004), Fed. R. Civ. P. 56(e). All evidence must be considered, but the court does not make credibility determinations. If the movant fails to meet its initial burden, summary judgment should be denied. *Little,* 37 F.3d at 1075.

However, the non-movant, to avoid summary judgment as to an issue on which it would bear the burden of proof at trial, may not rest on the allegations of its pleadings but must come forward with proper summary judgment evidence sufficient to sustain a verdict in its favor on that issue. *Austin v. Will-Burt Company,* 361 F.3d 862, (5th Cir. 2004). This burden is not satisfied with "some metaphysical doubt as to the material facts," by "conclusory allegations," by "unsubstantiated assertions," or by only a "scintilla" of evidence. *Little,* id.

In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." *Celotex* at 2553.

BACKGROUND

The case before the Louisiana Second Circuit Court of Appeal was Walker Lands' case filed against the East Carroll Parish Police Jury to stop all public use of Gassoway Lake and a drainage ditch which runs from the southern end of Gassoway Lake to Bunch's Cutoff, a large body of water that connects, at least on its southern end, with the Mississippi River. See Exhibit A, a topographic map of the disputed area.[4] The State of Louisiana was added to the case as an indispensable party. The State answered claiming ownership or, alternatively, a servitude on the disputed lands. Walker Lands also claimed ownership.

The Louisiana court of appeal affirmed the trial court's finding that Gassoway Lake was formed when the Mississippi first moved westward in the 1860's and 1870's and then slowly moved back eastward and formed Gassoway Lake at least by 1894. The court found that the lake and the lands between it and the Mississippi River were formed by accretion which deposited alluvion as the Mississippi moved back eastward. The court ruled that Walker Lands owns Gassoway Lake, the drainage ditch and the surrounding lands to the Mississippi River. The court reversed

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[4] The map is Plaintiff's Exhibit 8(a) published by the United States Geological survey (1994). The exhibit was originally filed as Exhibit 6(a) but, along with Exhibit 6, was renumbered when it was discovered that there was already an Exhibit 6.

the trial court's granting of an injunction prohibiting the public's use of the waters.

In its opinion, the court observed that at this point in its course, the Mississippi River's ordinary low water mark is 77 feet and its high water mark is 112 feet. The court noted that the Mississippi River levee sits at the western side of Gassoway lake. The channel of the Mississippi River is approximately three and a half miles east of Gassoway Lake. The court further found as a fact that "Gassoway Lake remains landlocked during most of the year and is practically inaccessible by boat." The court also found that at low water (77 feet) the ditch is "mostly dry" but at the high water mark, the waters of the Mississippi submerge all[5] of the lands in dispute, including Gassoway Lake, all the way to the levee on the west side of the lake.

The state court refused to enjoin the public at large from using the lands, finding no legal authority authorizing such action. The court also pretermitted ruling on the existence of legal servitudes on the property, finding that there was no justiciable controversy as between the State and Walker Lands on that issue.

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[5] The topographic map in evidence in this proceeding shows that the elevation in a few places on the lands is higher than 112 feet. At oral argument counsel for plaintiffs suggested, in answer to the court's inquiry, that approximately 95% of the lands are under water at the high water mark of 112 feet. That suggestion appears consistent with the topographic map.

The dispute comes to this court, then, as one to determine plaintiffs' rights to go upon the waters when they cover all or part of the Walker lands.[6] In brief, plaintiffs define the issue as follows:

> "The plaintiffs are seeking a declaratory judgment that they have the right to navigate along the irregular shore of the Mississippi River, notwithstanding who might own the bank and shore of the mighty Mississippi River.[7]
>
> "There is one fundamental legal dispute in this case that will resolve this case either in favor of Plaintiffs and public use of the entire navigable and fishable Mississippi River or not. The legal dispute is whether the public, including the Plaintiffs, have the federal right or state right to navigate, fish and hunt, and otherwise exploit, enjoy and utilize the full water surface of the Mississippi river at its normal water heights."[8]

It is clear from plaintiffs' complaint and from their multiple briefs that plaintiffs seek to navigate on and to fish and hunt on water between the

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[6] From this point on in this opinion, "the Walker lands" will refer to the land as well as Gassoway lake and the other water bodies on the land, including, without limitation, Gassoway Lake, "the drainage ditch", Little Gassoway Lake, Bunch's Cutoff (to the extent it lies within the State of Louisiana), and Doe Lake.

[7] Plaintiffs' brief, Doc. #5, p. 5.

[8] Plaintiffs' brief, Doc. #55, p. 2.

ordinary low water mark and the ordinary high water mark of the Mississippi River. They do not seek authority to go upon dry land belonging to Walker Lands or others and do not seek to go upon waters which flood lands when the Mississippi rises above its ordinary high water mark of 112 feet.

The topographic map in evidence shows that the normal elevation of Gassoway Lake is 95 feet.

ANALYSIS

A Preliminary Procedural Matter

Defendant argues that this case is moot because plaintiffs' complaint and their briefs assert entitlement to relief only "until the Second Circuit rules". Had this court interpreted plaintiffs' claims to be so limited, there would have been no need to abstain and to stay this case until the state courts had issued a final ruling. Plaintiffs' complaint anticipated that the state courts might decide the issues presented here. For example, in paragraph 28 plaintiffs assert that they "desire that this Honorable Court grant a declaratory judgment that until the Judgment of March 5, 1999, of the Second Circuit Court of Appeals is reversed, modified or a subsequent final judgment is rendered by a court of competent jurisdiction, specifying the ownership and navigational rights of the State of Louisiana and Walker Lands, Inc. . . . there is not sufficient evidence to support a verdict of guilty . . . ". See, to the same effect, paragraph 29. In addition, the prayer of the complaint in paragraph 2

asserts entitlement to relief until a court specifies the navigational rights of the persons in interest. As pointed out above, the Second Circuit expressly pretermitted ruling on the issue of navigational rights. No other court has decided the issue. Therefore plaintiffs' claims are not moot and have been adequately pled.

Plaintiffs' Rights To Go Upon The Disputed Waters

Plaintiffs claim that, in the past, they have each been arrested or threatened with arrest for violating Louisiana's trespass laws if they go upon the water when it covers the Walker lands. This court accepts, as it must,[9] the finding of the state courts that Walker Lands owns the lands under discussion here. However, ownership is irrelevant to this proceeding, for Louisiana law provides a remedy for trespass even to one who is only a possessor of property. *Manzanares v. Meche,* 506 So. 2d 957 (La. App. 3rd C. 1987), writ den. 508 So.2d 822 (1987). The issue is whether plaintiffs have a right to go upon the waters covering the Walker lands, regardless who owns them.

Plaintiffs seek a declaratory judgment and injunction recognizing their asserted rights to go upon the waters of the Mississippi river between its ordinary low water stage and its ordinary high water stage to navigate, fish and hunt. Plaintiffs claim

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[9] *Harper Macleod Solicitors v. Keaty & Keaty,* 260 F.3d 389 (5th C. 2001).

these rights are granted by federal law, specifically the Federal navigational servitude, and by Louisiana state law.

a) Plaintiffs' Rights under Federal Statutes and The Federal Navigational Servitude

When Louisiana was admitted to the Union, on equal footing with the original thirteen states, Louisiana received ownership of all navigable waters within its borders and all tide waters and the lands under them from the United States in public trust.[10] See *Phillips Petroleum Co. v. Mississippi,* 108 S. Ct. 791 (1988); *Dardar v. Lafourche Realty Co., Inc.,* 985 F.2d 824 (5th C. 1993). A condition of its admission was that the Mississippi river and all navigable rivers and waters leading into it "shall be common highways and forever free . . . " Act of Congress February 20, 1811, 2 U.S. Stats. 641, Act of Congress April 8, 1812, 2 U.S. Stats. 701. Current law provides that "[a]ll the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways." 33 U.S.C. § 10. In *The Daniel Ball,* 77 U.S. 557, 19 L. Ed. 999 (1870), the Supreme Court said: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when

[10] However the federal common law public trust doctrine probably does not provide this court with subject matter jurisdiction. *State of New York v. DeLyser,* 759 F. Supp. 982 (W.D. New York 1991).

they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." See also 16 U.S.C. § 796. This court takes judicial notice that the Mississippi River was navigable in 1812 and remains so today. See *State of Arizona v. State of California,* 51 S. Ct. 522 (1931). The parties do not dispute the navigability of the Mississippi River.

i) Federal Statutes

Plaintiffs argue that their asserted right to navigate on and to fish and hunt on waters of the Mississippi is recognized by the Federal navigation statutes and is also a "subset" of the Federal navigational servitude.

The Federal navigation statutes are found in 33 U.S.C. § 1, et seq. Plaintiff points specifically to 33 U.S.C. § 10 which provides:

> "All the navigable waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways."

This provision codifies the Act of Feb. 20, 1811, mentioned above.

While the obvious intent of this provision is to ensure the public's right to navigate on the navigable waters, the extent of those rights is not set forth in the statute or in other Federal statutes we have found or to which we have been referred by counsel. Unquestionably, the Federal government may, pursuant to the Commerce Clause, constitutionally regulate the extent of those rights and it has chosen to do so to some extent as will be discussed below. Similarly, Louisiana retains the right to regulate such bodies within its borders pursuant to its ownership of the water bottoms obtained upon its admission to the Union. The fact that the navigable waters, including the Mississippi, shall remain a public highway, however, does not preempt Louisiana's power to regulate them. *Cummings v. City of Chicago,* 23 S. Ct. 472 (1903); *Wood Marine Service, Inc. v. City of Harahan* 858 F.2d 1061 (5th C. 1988). Louisiana, too, has chosen to regulate its navigable waters as will also be discussed below. However, I do not find that 33 U.S.C. § 10 grants to plaintiffs the right to fish or hunt on navigable waters in Louisiana nor does it, standing alone, define the extent of the plaintiffs' rights to use the waters as a public highway. For that we must look to other state and federal laws, as will be discussed.

ii) The Federal Navigational Servitude

In general, all persons have the right to use open navigable waters. *Gibbons v. Ogden,* 6 L. Ed. 23 (1824); *Gray v. Bartlett,* 37 Mass. (20 Pick.) 186 (1838). The public right of navigation "entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, as well as for carrying persons or property for hire, and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common." *Silver Springs Paradise Co. v. Ray,* 50 F.2d 356 (5th C. 1931) [so-called old Fifth Circuit]. However, certain otherwise navigable waters located on private property and constructed with private funds are nevertheless not subject to public use. See, e.g. *Kaiser Aetna v. United States,* 100 S. Ct. 383 (1979); *Vaughn v. Vermillion Corporation,* 100 S. Ct. 399 (1979). While it has been implied that the right of the public to use certain navigable waters depends upon the existence of the federal navigational servitude,[11] the Federal navigational servitude does not define the parties' rights to use the navigable waters, but is

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[11] In *Dardar v. Lafourche Realty Co., Inc.,* 985 F.2d 824 (5th Cir. 1993), the court of appeal had before it a suit by commercial fishermen seeking recognition of their right to fish upon waters they claimed were navigable. The court remanded the case for a determination whether a federal navigational servitude existed on some of the waters at issue and thus did not reach the issue of plaintiffs' asserted rights to fish in the waters. See also, *United States v. Harrell,* 926 F.2d 1036 at 1040 (11th C. 1991).

more "an expression of the notion that the determination whether a [eminent domain] taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." *Kaiser Aetna v. United States,* 100 S. Ct. 383 (1979).

Early in our nation's history our Supreme Court held that the power to regulate commerce necessarily includes power over navigation. *Gibbons v. Ogden,* 6 L. Ed. 23 (1824). In *United States v. Rands,* 88 S. Ct. 265 (1967) the Court observed:

> "The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.' Gilman v. City of Philadelphia, 3 Wall. 713, 724-725, 18 L. Ed. 96 (1866). This power to regulate navigation confers upon the United States a 'dominant servitude' FPC v. Niagra Mohawk Power Corp., 347 U.S. 239, 249, 74 S. Ct. 487, 493, 98 L.Ed. 6886 (1954), where extends to the entire stream and the stream bed below ordinary high water mark." (Emphasis added).

See also, *United States v. Cherokee Nation of Oklahoma,* 107 S. Ct. 1487, 1490 (1987); *United Texas Transmission Company v. United States Army Corps*

of Engineers, 7 F.3d 436 (5th Cir. 1993); *United States v. 119.67 Acres of Land,* 663 F.2d 1328 (5th Cir. 1981).

The comprehensive nature of Congress' regulatory authority over national waters was more fully described in *United States v. Appalachian Power Co.,* 61 S. Ct. 291 (1940) at 308:

> "[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . . [The] authority is as broad as the needs of commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted to the Federal Government." See also *Kaiser Aetna et al v. United States,* 100 S. Ct. 383 (1979).

From the Federal government's power to control all navigable waters of the United States comes the dominant "navigational servitude" which extends to all areas below the ordinary high water mark. *Cherokee Nation of Oklahoma,* 107 S. Ct. 1487 (1987); *United States v. 119.67 Acres of Land,* 663 F.2d 1328 (5th C. 1981); *United Texas Transmission Company v. United States Army Corp of Engineers,* 7 F.3d 436 (5th C. 1993).

Federal law defines high water mark differently than does Louisiana law.[12] "Ordinary high water mark is defined in 33 C.F.R. § 329.11, concerning the jurisdiction of the Army Corp of Engineers, to be "the" line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of the soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas." In *Goose Creek Hunting Club, Inc. v. United States,* 518 Fed 2d 579 (Ct. Cl. 1975), the court noted that "[j]udicial decisions indicate that the ordinary high-water mark can be variously defined – e.g., as the line where the water stands sufficiently long to destroy vegetation below it (*Kelley's Creek and Northwestern R.R. v. United States, 100 Ct. Cl. 396, 406 (1943)*); or as the line below which the soil is so usually covered by water that it is wrested from vegetation and its value for agricultural purposes destroyed (*Harrison v. Fite,* 148 F. 781, 783 (8th C. 1906)); or as the line below which the waters have so visibly asserted their dominion that terrestrial plant life ceases to grow and, therefore, the value for agricultural purposes is destroyed (*Borough of Ford City v. United States,* 345 F.2d 645, 648 (3rd C. 1965), cert. denied, 382 U.S. 902, 86 S. Ct. 236, 15 L.Ed2d 156 (1965)); or as the line below which the soil is kept bare of vegetation by

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[12] See p. 16.

the wash of the waters of the river from year to year in their onward course (*State of Oklahoma v. State of Texas,* 260 U.S. 606, 632, 43 S. Ct. 221, 67 L.Ed.2d 428 (1923)).”[13]

Unquestionably, the rights of the United States extend to the Constitutional purposes of commerce, navigation (including the navigational servitude), national defense, and international affairs. 43 U. S. C. 1314 (Submerged Lands Act). The navigational servitude “is an extremely old concept – owners of property or property rights *within navigable waters* take those rights fully cognizant of their limited nature.” *Coastal Petroleum Co. v. United States,* 524 F.2d 1206, 1209 (5th Cir. 1975) and cases cited therein.

Despite these observations on the wide reach of the Federal government when it comes to regulating navigable waters for commerce, navigation, national defense and international affairs, I have found no authority, and plaintiffs have directed the court to none, for the proposition espoused by plaintiffs that the Federal navigational servitude operates to grant persons the right to fish or hunt on navigable waters. Once again, the Federal navigational servitude is only “an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the

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[13] Compare, as to tidelands, *Borax Consolidated, Ltd. v. City of Los Angeles,* 56 S. Ct. 23 (1935).

flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." *Kaiser,* supra.

Therefore, I find that the Federal navigational servitude does not provide plaintiffs with the right to fish or hunt on the Mississippi River.

However, I find that, because the Mississippi river is a navigable waterway, there is a federal common law right of navigation which includes the right to reasonably use the Mississippi's waters for the purposes, among other things, of navigation including travel and transportation, commerce, boating, sailing, and fishing and hunting from boats. See *Gibbons,* supra; *Silver Springs Paradise Co.,* supra. These rights apply laterally across the entire surface of the river [33 U.S.C. 1, 3; 33 CFR § 329.4 (1978)] to the high water mark.[14]

Walker Lands cites *Zunamon & Chicago Mill & Lumber Co. v. U.S.,* 221 Ct. Cl. 835 (Ct. Cl. 1979) which in turn cites *Goose Creek Hunting Club, Inc. v. United States,* 518 F.2d 579 (Ct. Cl. 1975), and *United States v. Harrell,* 926 F.2d 1036 (11th Cir. 1991), in support of its argument that the subject waters are not navigable and thus not subject to public use. However, in *Zunamon,* the court was unable to determine whether or not the disputed area was within the bed (as defined by Federal law which includes the

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[14] As defined by Federal law.

"bank"). In *Goose Creek,* the court found that the area in dispute was outside the ordinary high water mark of the river and thus not subject to government use without compensation. Likewise, in *Harrell,* the court held that the government's navigational servitude did not extend past the high water mark. The reasoning of all three cases is consistent with the analysis here.

b) Plaintiffs' Rights Under Louisiana Law

i) Legal precepts

In Louisiana, ownership of things is dependent on their designation as common, public or private. La. CC Art. 448. Public things are owned by the State and include running waters and the waters and bottoms of natural navigable water bodies, the territorial sea and the seashore. La. CC Art. 450. Public things are subject to public use, laws and regulations. La. CC. Art 452. Private things are owned by individuals but may be subject to public use. La. CC Arts. 453, 455.

A river consists of three things: the running water, the bed, and the banks. Yiannopoulos, Louisiana Civil Law Treatise, Property, 3rd Ed., Ch.5, §84; *State v. Richardson,* 72 So. 984 (1916). The waters are a public thing. La. CC Art. 450; La. R.S. 9:1101. Likewise, the bed of the river below the mean low watermark is a public thing. Yiannopoulos, Louisiana Civil Law Treatise, Property, 3rd Ed., Ch.4, §74; *Wemple v. Eastham,* 150 La. 247, 90 So. 637 (1922). The water and the bed are public things which may

not be privately owned. *Mayor of New Orleans v. Metzinger,* 3 Mart. (O.S.) 296, 303 (La. 1814). The banks of navigable rivers are private things subject to public use. La. CC Art. 456. Ordinarily, the bank belongs to the riparian landowner. See Comment (b) to La. CC Art. 456. The bank of a river is defined as the land lying between the low water stage of the river and the high water stage. La. CC Art 456. However, where there is a levee in proximity to the water, the levee is the bank. Id.

When Louisiana was admitted to the Union, it received title to all lands of navigable rivers, including the Mississippi River, below the then high water mark. *Pollard v. Hagan,* 44 U. S. 212 (1845); *State v. Placid Oil Co.,* 300 So.2d 154 (La., 1974). The state has the right, therefore, to fix titles and boundaries as to riparian owners. *Pollard,* supra; *Placid Oil,* supra.

The banks of a river are defined by Louisiana law as the land lying between the ordinary low stage and the ordinary high stage of the water. CC Art. 456. The high water stage is determined by calculating the mean annual high of the river, rather than observing physical markings. *DeSambourg v. Board of Commissioners, et al,* 608 So.2d 1100 (La. 4th C. 1992).[15] It is the highest stage that the river usually reaches at any season of the year. *Wemple v. Eastham,* 90 So.

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[15] In this regard, the definition of high water differs from the Federal law. See discussion, p. 12-13.

637 (1922). Under Louisiana law, the bed is the land covered by water at the river's ordinary low stage. Id.[16]

Private ownership of the banks of a navigable river in Louisiana "is not inconsistent with the navigability of the body or stream. Nor is navigability affected by such ownership; such ownership and the full enjoyment thereof may be somewhat impaired by reason of the superior rights of the Government and the public to the unhampered use of the water above them for navigation, commerce or fishing." *D'Albora v. Garcia,* 144 So. 2d 911 (La. App. 4th C. 1962). This impairment of the landowner's rights is not substantially different from that occurring where the Federal navigational servitude is present. See *Rands,* 88 S. Ct. at 266; *Lambert,* 835 F. 2d at 1111. Those acquiring riparian rights in Louisiana take their lands subject to the rights of public use set forth in La. C.C. Art. 456 and those applicable to the waters themselves recognized in *D'Albora* and in La. C.C. Arts. 450 and 452. "The riparian owner may use the running water for his purposes, but he may not interfere with, nor prevent its use by the general public." La. C.C. Arts. 657 and 658; Yiannopoulos, 2

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[16] Federal law considers the term bed to include the bank, that is to include the land up to the ordinary high water mark, a term defined by Federal law and which differs from the state law definition of high water mark. See as to bed, *Rands,* 88 S. Ct. at 266; *United States v. Kansas City Life Ins. Co.,* 70 S. Ct. 855 (1950); *United States v. Willow River Power Co.,* 65 S. Ct. 761 (1945).

La. Civ. Law Treatise §36, 99 *et seq.* (2d ed. 1980). "Therefore, the possessor of the bed, or owner for that matter, may not fence or enclose the 'land' so as to impede the use of the flowing water." *Chaney v. State Mineral Board,* 444 So.2d 105, 108 (La 1983). The same holds true as to the bank of the river. See La. CC Art. 450.

The Louisiana Civil Code clearly grants to the public the right to use the State's "running waters" and "waters" of natural, navigable rivers. La. CC Art. 450, 452. Those waters remain public regardless of their stage, that is whether they are at low water mark, high water mark or somewhere in between.

ii) "Everyone has the right to fish in the rivers. . . . "[17]

The Louisiana Supreme Court has recognized that "[t]he public has a traditional right to fish from boats in the navigable waters of the state." *State v. Barras,* 615 So.2d 285 (La. 1993). In *Barras,* the Louisiana Supreme Court considered the case of two commercial crawfishermen who were convicted of trespass in violation of La. R.S. 14:63.3, for remaining on property belonging to another after being forbidden. The two men had only been seen on the property, which was near the Atchafalaya River, in boats. At least one of the two was seen entering a canal on the

[17] La. CC Art. 452

property and fishing in a "slew". The Supreme Court noted that "the public has a traditional right to fish from boats in the navigable waters of the state" and cited La. CC Art. 452, Yiannopoulos, supra, § 58, and 33 U.S.C. § 10. The trial court found that, although the area where the two men were fishing was inside the levees, it was not on the banks. The court of appeal stated that the property was part of the Atchafalaya River's flood plains. The Supreme Court found that the record supported both conclusions and found it determinative that the two defendants were crawfishing on "flooded swamp land," not on the banks of a navigable stream or in navigable waters. Justice Dennis (now Circuit Judge) dissented, pointing out that the state had failed to prove that the area was not part of the bank of the river and thus subject to public use.

Barras is instructive in that it, like La. CC Art 452, recognizes the public's right to fish[18] from boats in the navigable waters of the state.

Barras is also important in another respect: The court held "[t]he Barras brothers were crawfishing on flooded swamp land, not on the submerged banks of a navigable stream or in navigable waters." Therefore, the decision turned on whether the defendants were or were not fishing within the banks of the river, that is, fishing on waters between the ordinary low water mark and ordinary high water mark of the river.

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[18] Fish are the property of the state. La. R.S. 56:3.

Barras, like the instant case, also involved other bodies of water located on the area argued to be banks.

The sheriff argues that this court should adopt the position that "lands occasionally flooded by navigable streams or rivers may be subject to a navigational servitude, but the purposes of this servitude do not include hunting or fishing on waters temporarily covering private property." In support, the sheriff cites *Edmiston v. Wood,* 566 So.2d 673 (La. App. 2nd Cir. 1990) for the proposition that private land does not become subject to unlimited public use when backwaters flood it. *Edmiston* is easily distinguished. In *Edmiston,* plaintiffs argued that, when they duck hunted in a boat on waters near the Mississippi River, they were simply making use of the navigable body of water. The court found, however, that the waters on which they hunted were not over the banks of the river but were on waters *above* the ordinary high stage of water and, therefore, they were not subject to public use of any kind.

Defendant also cites *Warner v. Clarke,* 232 So.2d 99 (La. App. 2nd C. 1970).[19] However, *Warner* is distinguishable because it involved plaintiffs who wanted to go upon riparian land to hunt and fish. It did not involve persons seeking to use only the waters of the Mississippi.

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[19] Coincidentally, *Warner* also concerned lands located in East Carroll Parish.

Walker Lands cites *Buckskin Hunting Club v. Bayard,* 868 So.2d 266 (La. App. 3rd C. 2004) in support of its argument that the Walker lands are not subject to public use. The case involved the plaintiff's request for an injunction to prohibit hunters from entering property in the Atchafalaya basin which it leased for its hunting club. While it is difficult to determine from the court's opinion whether the alleged trespassers there were found on land or water, it appears that most likely they used both. The court correctly ruled that the dry banks of a navigable river may not be used by the public for hunting. It also ruled that the man-made private canals located on the property could not be used. The court also found that there was a difference between the banks of a navigable river and its flood plains, presumably finding that the lands at issue were not within the banks of the river as defined by Louisiana law. The Buckskin case is consistent with the reasoning and analysis here: the public has a right to use the waters of a navigable river within its banks, that is, up to its high water mark, but has no right to use waters beyond the bank nor to use the dry bank for hunting.[20]

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[20] Walker Lands also spends much time in its brief arguing that this court must treat the issues in the Louisiana Second Circuit proceedings as res judicata and not allow re-litigation of issues determined there. I agree. The Second Circuit affirmed the trial court's determination as to the manner in which Gassoway lake was created and its ownership in Walker Lands, and that Gassoway lake and the drainage ditch were not

(Continued on following page)

Finally, La. R.S. 56:640.3 recognizes Louisiana's public policy "that all citizens of the state have a right to fish in and otherwise enjoy marine waters as long as they are in compliance with current licensing requirements." The statute further "recognizes continued public access to fishing opportunities in marine waters." Although the statute applies to marine waters, it evidences Louisiana's strong public policy regarding citizens' rights to fish in public waters.

Based on the foregoing, I find that the public has the right under Louisiana law to use the waters of this navigable river, the Mississippi, up to the

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navigable. Although the trial court enjoined the public from access to the property and waters based on its determination that no servitudes or other rights to enter the property existed, the court of appeal reversed that part of the judgment and refused to enjoin the public or the State. It found no justiciable controversy between the State and Walker Lands and specifically "pretermit[ted] discussion of the available use of these legal public servitudes during times of high water." The issues before this court were not decided by the Second Circuit and thus have not been re-litigated. It is therefore not necessary to determine the extent to which res judicata, including claim preclusion (res judicata) or collateral estoppel (issue preclusion) might otherwise apply. See *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385 (5th Cir. 2004). However, I note that the parties are not the same nor are they in privity. Although Walker Lands argues that the plaintiffs here and the State in the state court proceeding are in privity, the fact is that the very reason the Second Circuit refused to enjoin the State or the public and pretermitted a ruling on the applicability of legal servitudes during times of high water was because it found that the State (unlike the plaintiffs here) had not attempted to go upon the property or seek access to it.

ordinary high water stage (as defined by Louisiana law) which is 112 feet as found by the Louisiana Second Circuit. The public uses must be reasonable[21] but, like the federally recognized rights to use navigable waters discussed above must include, at the very least, those traditional uses of navigation (including travel and transportation), commerce, boating, sailing, and fishing and hunting from boats.[22]

The right to use the river's waters includes the right to use the entirety of the waters, regardless the river's level or stage or how much of its bank it covers. It is nonsensical to suggest that persons may use that portion of the water covering the bed and a part of the bank when the water is at its usual or normal stage, somewhere between low and high water stage, but cannot use the waters when they rise to cover any additional portion of the bank. Were the law to adopt such a rule, an unreasonable and, indeed, impossible burden would be placed on the public to ascertain, at any given point in time, just where on the surface of the water the boundary between the bed and the bank lay at any given point along the river even at normal or usual stages of the river. The purpose of the law having recognized the bank as a private thing subject to public use is for the very reason that

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[21] *Phillips Petroleum Company*, 484 U.S. 469, 108 S. Ct. 791, 797 (1988).

[22] See, as to hunting migratory birds from a boat, 50 C.F.R. §20.21.

flowing rivers rise and fall with the seasons and the weather.

Neither does the fact that, at certain river stages, there may be visible on the bank lakes, bayous, ditches or other non-navigable water bodies or even privately owned man-made structures change the fact that the river may be used to its full extent – that is, even when it covers, in part or full, its banks and anything on them.

Walker Lands argues in its amicus brief that "[s]loughs, creeks, ditches, etc. that connect with navigable streams are not thereby made navigable if not used as highways of commerce and the navigation servitude is not applicable even if navigable waters back up into them", citing *Zunamon,* supra. However, plaintiffs' rights do not depend on the navigability of the ditches and other water bodies lying within the banks of the river, but rather devolve from the fact that the Mississippi itself is a navigable river and remains so to the high water mark regardless its water stage.[23] The river's character as a navigable river and the public's rights to use it do not change by the fact that, in rising, it may cover land, structures or other water bodies lying within its own banks.

In this case, plaintiffs have a right, under Louisiana law, to use the waters up to the high water stage

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[23] *Zunamon* denied summary judgment because the court could not determine whether the property was within the high water mark of the river or not.

as found by the Second Circuit of 112 feet. Although at that stage the Mississippi River's waters will, according to the topographic map, be at or against the levee, I do not find that the levee defines the bank in this case because it is not in proximity to the river (La. CC Art. 456), but is over 3½ miles away; rather the high water mark defines the upper limits of the bank in this case. In this case, however, it just so happens that the high water mark is at or against the levee.

Finally, the rights recognized herein are not predicated on any public right to use the banks of the river (which rights are limited – see CC Art. 456; La. Op. Att'y Gen. 96-257) but rather on the public's right to use the waters of the river itself even when it covers those banks in whole or in part.

Riparian owners and their predecessors in title, who chose to purchase riparian property, are charged with holding it subject to the rights of the public to use the river's waters as provided by Louisiana and Federal laws and subject to the rights of the Federal and State governments to regulate their use. Walker lands argues that it and its predecessors in title have owned the subject property in private ownership for a hundred and seventy years and that it has a right to limit access to it. What Walker Lands fails to acknowledge, however, is that its riparian land lies within the bank of the Mississippi river, a navigable river, and it and its predecessors in title chose to purchase the property subject to various rights in the Federal government, the State government, and the

public, including regulation for purposes of interstate and foreign commerce, navigation (including the Federal navigational servitude), national defense, certain limited rights under State law to use the banks and the public's rights to use the waters of the river.

The Civil Rights Act and Probable Cause

In the complaint filed December 17, 2001, and verified[24] by each plaintiff, plaintiffs seek damages for violation of their civil rights on account of their arrests. Each plaintiff alleges that he has been arrested on at least one occasion by the defendant sheriff.[25] Further, plaintiffs Roberts, Balch, and Watts have each filed affidavits as to the fact of their arrests. However, the dates of the arrests were not set forth.[26] By supplemental chronology, Document # 76, consented to by opposing counsel, plaintiff Gammill states that he was first arrested in 1996. Watts was

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[24] A verified complaint made on personal knowledge is competent summary judgment evidence. *Hart v. Hairston*, 343 F.3d 762, 764 (5th Cir. 2003); 28 U.S.C. 1746. See, as to personal knowledge, *Huckabay v. Moore*, 142 F.3d 233, 240 (5th Cir. 1988).

[25] Sheriff Shumate became sheriff on May 11, 1998.

[26] Plaintiff Watts filed a supplemental affidavit on October 5, 2006 alleging that he was again arrested on April 26, 2005, over 3 years after this suit was filed. However, the complaint has not been amended to include a claim for damages for that arrest.

arrested in 1997 and Rogers and Watts in 1999. Parm was arrested in 1999 and Balch in 1999.[27]

The sheriff is sued only in his official capacity. Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 2035 n.55 (1978). However, to be liable in one's official capacity under 42 U.S.C. § 1983, the defendant must have been delegated policy-making authority under state law. In essence, suing a party in his official capacity is duplicative of an action against the municipality for which the official serves as an agent. *City of St. Louis v. Praprotnik,* 485 U.S. 112, 125, 108 S.Ct. 915 (1988). Also, *Turner v. Houma Mun. Fire and Police Civil Serv. Bd.,* 229 F.3d 478, 483 (5th Cir. 2000).

Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law. *Hafer v. Melo,* 502 U.S. 21, 25, 112 S.Ct. 358, 361-362 (1991). In contrast, personal-capacity suits which seek to impose individual liability upon a government officer for actions taken under color of state law are recognized under Section 1983. *Hafer,* 502 U.S. at 25. A state official can be sued in his individual capacity and be held personally liable under § 1983 if it can be

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[27] Statute of limitations issues have not been raised.

shown that the official, acting under color of state law, caused the deprivation of a federal right. However, such persons are entitled to assert qualified immunity. *Hafer,* 502 U.S. at 25-31.

Also, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. *Turner,* 229 F.3d at 483. An official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Turner,* 229 F.3d at 484.

La. R.S. 33:9001, et seq., empower the sheriff to raise revenues to finance his facilities and services through the creation of a continuing legal entity in each parish known as a law enforcement district, whose corporate existence survives the term of office of any individual sheriff.[28] *Prator v. Caddo*

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[28] La.R.S. 33:9001 states:

"There is hereby created, in each parish except Orleans, a special district to be known as a law enforcement district for the purpose of providing financing to the office of sheriff for that parish. In the parish of Orleans such a special district is hereby created for the purpose of providing financing to the office of criminal sheriff. The provisions of R.S. 33:9002, 9003(D), 9007, 9008, and 9010 shall apply to the district created in the parish of Orleans. No other provisions of this Chapter shall be applicable thereto. The boundaries of each district shall be coterminous with the boundaries of the parish and the duly elected sheriff of the parish or in the parish of Orleans, the criminal sheriff or his successor shall be ex officio the chief executive officer of the district."

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Parish, 38,085 (La. App. 2 Cir. 1/28/04), 865 So.2d 932, 936.

Law Enforcement Districts were discussed in *City of Shreveport v. Caddo Parish,* 27,519 (La.App. 2 Cir. 6/23/95), 658 So.2d 786, 794-795:

"The law enforcement districts were created in 1976 to provide financing to the office of the sheriff in each parish. . . . Over time the powers of the law enforcement districts have been expanded to grant the sheriff the ability to raise funds related to jails. In 1988, LSA-R.S. 33:1422 was amended to add the following section:

"D. Notwithstanding the provisions of R.S. 33:4713, a sheriff and ex officio tax collector may purchase and equip such real property as is necessary in the performance of his duties, including but not limited to an adequate and safe jail. The ownership of such real property shall be vested in the parish law enforcement district.

"In 1989, LSA R.S. 33:9010 was amended to expand the law enforcement district's long-term borrowing powers to include the following provision:

"D. (1)(a) Each district is authorized to issue revenue bonds in order to obtain funds to acquire, construct, reconstruct, renovate, improve, replace, maintain, repair, extend, enlarge, lease, as lessee or lessor, purchase, or equip such immovable or movable property, including but not limited to jails, administration or office buildings, maintenance, storage or utility facilities, or any other facility, building, structure, equipment, or furnishings which may be of use or benefit to the district or to the applicable sheriff.

"However, these provisions are entirely discretionary. They are not mandatory, as are the obligations imposed upon the parish. While the sheriff may have the option of resorting to these fund-raising methods to secure funds for jails – with the approval of the voters – there is no mechanism in these statutes which requires him to do so."

Therefore, a suit against Sheriff Shumate in his official capacity is actually a suit against the East Carroll Parish Law Enforcement District.

a) Qualified Immunity

Sheriff Shumate asserts the defense of qualified immunity. The defense of qualified immunity protects a public official from both litigation and liability, absent a showing that the official violated a constitutional right that was clearly established at the time of the incident. *Woods v. Smith,* 60 F.3d 1161, 1164 (5th Cir. 1995), cert. den., 516 U.S. 1084, 116 S.Ct. 800 (1996). Qualified immunity cloaks a police officer with immunity from personal liability for discretionary acts which do not violate well established law. Officers have qualified immunity if their actions could reasonably have been thought consistent with the right they are alleged to have violated. *Richardson v. Oldham,* 12 F.3d 1373, 1380-81 (5th Cir. 1994), and cases cited therein. Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. *Hope v. Pelzer,* 536 U.S. 730, 122 S.Ct. 2508, 2515 (2002).

A § 1983 suit naming defendants in their "official capacity" does not involve personal liability to the individual defendant. The only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses. Officials sued in their personal capacities may assert personal immunity defenses such as objectively

reasonable reliance on existing law. *Hafer v. Melo,* 502 U.S. 21, 25, 112 S.Ct. 358, 362 (1991). However, qualified immunity attaches only to officials in their individual, not their official, capacities. *Foley v. University of Houston System,* 355 F.3d 333, 337 (5th Cir. 2003).

Neither the law enforcement district, nor Sheriff Shumate in his official capacity, are entitled to qualified immunity. *Owen v. City of Independence, Mo.,* 445 U.S. 622, 650, 100 S.Ct. 1398, 1415 (1980); *Foley,* 355 F.3d at 337.

b) Official capacity

In *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 689, 98 S.Ct. 2018, 2035 (1978), the Supreme Court held that, since there is no respondeat superior liability under Section 1983, a municipality may not be held liable under Section 1983 solely because it employs a tortfeasor. In *Board of Cty. Comm'rs of Bryan Cty. v. Brown,* 520 U.S. 397, 403-404, 117 S.Ct. 1382, 1388 (1997), the Supreme Court further held that a plaintiff seeking to impose liability on a municipality under Section 1983 is required to identify a municipal "policy" or "custom" that caused the plaintiff's injury. Locating a "policy" ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. In *Barrett v. Kocher,* 127 Fed.Appx. 697,

2005 WL 752780 (5th Cir. April 4, 2005), the Fifth Circuit stated, "In narrow circumstances, even a single incident can establish an official policy 'where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train,'" quoting *Burge v. St. Tammany Parish,* 336 F.3d 363, 373 (5th Cir.2003), cert. denied, 540 U.S. 1108, 124 S.Ct. 1074, 157 L.Ed.2d 895 (2004).

State law guides the court's determination of identifying those officials whose decisions represent the official policy of the local government unit. *Craig v. St. Martin Parish Sheriff,* 861 F.Supp. 1290, 1301 (W.D. La. 1994), citing *Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 737, 109 S.Ct. 2702, 2724 (1989). Under Louisiana law, the sheriff is a final policymaker. *Craig,* 861 F.Supp. at 1301, citing La. Const. Art. 5, § 27 ("[The sheriff] shall be the chief law enforcement officer in the parish."); La.R.S. 33:1435 ("Each sheriff . . . shall preserve the peace and apprehend public offenders.").

Plaintiffs allege that they were arrested for criminal trespass pursuant to La. R.S. 14:63[29] for being on navigable waters covering the Walker land.

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[29] The complaint erroneously refers to La. R. S. 14: 67, Theft. In brief, plaintiffs refer to La. R.S. 14: 63. However, there also exists another trespass statute: La. R.S. 14: 63.3. In brief, plaintiffs also argue the applicability of La. R.S. 14:63.12;

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The statute, La. R.S. 14:63, provides, in pertinent part:

"No person shall enter upon immovable property owned by another without express, legal, or implied authorization."

A police officer may arrest a person if he has probable cause to believe that person committed a crime. *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 1699 (1985); La. C.Cr.P. art. 213. The constitutional torts of false arrest, unreasonable seizure, and false imprisonment require a showing that there was no probable cause. *Brown v. Lyford,* 243 F.3d 185, 189 (5th Cir.), cert. den., 534 U.S. 817, 122 S.Ct. 46 (2001). Probable cause justifying an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. *Michigan v. DeFillippo,* 443 U.S. 31, 37, 99 S.Ct. 2627 (1979); *Gladden v. Roach,* 864 F.2d 1196, 1199 (5th Cir.), cert. den., 491 U.S. 907, 109 S.Ct. 3192 (1989). Louisiana courts have explained it thus:

> "Probable cause to arrest exists when facts and circumstances within the arresting officer's knowledge and of which he has reasonable and trustworthy information are

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however, that statute was repealed in 2003, after plaintiffs' brief was filed in 2002.

> sufficient to justify a man of average caution in the belief that the person to be arrested has committed or is committing an offense. Although mere suspicion cannot justify an arrest, the officer does not need sufficient proof to convict. Probable cause must be judged by the probabilities and practical considerations of everyday life on which average men, and particularly average police officers, can be expected to act."

Brown v. Rougon, 552 So.2d 1052, 1056 (La. App. 1st Cir. 1989), writ den., 559 So.2d 121 (La. 1990), and cases cited therein.

There is scant evidence before the court as to the circumstances of plaintiffs' arrests. The verified complaint states that each plaintiff has been arrested "by the Defendant" (sheriff), but does not state whether that is literally true or whether the sheriff acted through his deputies.

In either event, the sheriff did not have probable cause to arrest the plaintiffs because the sheriff should have known that the plaintiffs were legally authorized to be upon the waters. La. R.S. 14:63. The sheriff was required to know that the Mississippi River is a navigable river and that federal and state law, as discussed in detail above, has long recognized

that the public has a right to use those waters to their full extent.[30]

Further, because plaintiffs had been arrested more than once, they have proven a policy or custom on the part of the sheriff to make arrests for trespass on the Walker lands without probable cause whenever the Walkers asked him to do so. See sheriff's affidavit, Ex. D, Doc. #12.

There are no genuine issues of material fact. Because the arrests were without probable cause to believe an offense had been committed, the sheriff violated the 4th amendment rights of the plaintiffs and is answerable to them for any damages they have sustained. The extent of those damages must be determined by additional motion or trial.

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[30] Plaintiffs claim the sheriff knew the district attorney would not prosecute anyone arrested for being on the water over the Walker lands because he believed the law was unsettled as to whether that constituted a trespass. That fact, if true, would constitute additional evidence that the sheriff knew he did not have probable cause to arrest the plaintiffs for trespass. Compare, *Brown v. Rougon*, 552 So.2d 1052, 1056 (La. App. 1st Cir. 1989), writ den., 559 So.2d 121 (La. 1990) (sheriff correctly relied on advice from the district attorney and landowner, that the general public did not have the right to use the canal, in deciding there was probable cause to arrest trespassers). However, the Sheriff correctly notes that the letter from the district attorney saying he would not prosecute was dated April 22, 2002, long after the arrests complained of.

Injunction

Plaintiffs seek an injunction against the sheriff enforcing the trespass laws with regard to them on the Walker lands. In brief, plaintiffs have advised the court that [one] laudable effect of this litigation has been the Sheriff's voluntary cessation of arresting people navigating on the waters in dispute in this matter. See Doc. #20 filed July 26, 2002. However, the supplemental affidavit filed by plaintiff Watts shows that the sheriff has at least arrested Watts since that time for trespass on these lands. See Doc. #50-2.

It would be improper for this court to enjoin Sheriff Shumate from enforcing the trespass laws with regard to the Walker lands. The Walkers are entitled to equal protection of the law; the sheriff must perform his job duties. Moreover, enjoining Sheriff Shumate from properly enforcing the trespass laws would not assist the plaintiffs in this matter, since the problem in this case has not been the proper enforcement of the trespass law, but rather arrests made without probable cause to believe the trespass law had been violated. Accordingly, plaintiff's request for injunctive relief, enjoining Sheriff Shumate from enforcing trespass laws over Walker lands, should be denied. Likewise, enjoining Sheriff Shumate from falsely arresting plaintiffs for being upon the water over Walker lands would also be inappropriate. If Sheriff Shumate persists in violating plaintiffs' constitutional rights, their recourse is in this court.

State Law Claims for False Arrest/False Imprisonment

Louisiana state law recognizes the tort of false arrest. *Alvarado v. Poche,* 2002-2 (La. App. 3d Cir. 6/5/02), 819 So.2d 1150, 1152. In order for a plaintiff to recover for false arrest, he must prove that he was unlawfully detained by the police against his will. Thus, two elements are required to prove a case in false arrest and imprisonment: (1) detention of a person, and (2) unlawfulness of the detention. *Dumas v. City of New Orleans,* 2001-0448 (La.App. 4 Cir. 12/05/01), 803 So.2d 1001, 1003, writ den., 2002-0024 (La. 3/15/02) 811 So.2d 912, citing *Harrison v. State Through Dept. of Public Safety and Corrections,* 97-1086 (La. 12/1/98), 721 So.2d 458, 461; *Hughes v. Gulf International,* 593 So.2d 776, 780 (La. App. 4th Cir. 1992), writ den., 595 So.2d 658 (La. 1992). As discussed at length above, the sheriff arrested the plaintiffs, or authorized their arrest, without probable cause to believe a crime had been committed. Therefore, Sheriff Shumate should be held liable to plaintiffs under state law, as well, for any damages plaintiffs prove.

CONCLUSION

For the foregoing reasons, IT IS RECOMMENDED that:

1) Plaintiffs' motion for summary judgment (Doc. #5) be GRANTED and defendant's motion (Doc. #11) be DENIED and that JUDGMENT be entered DECLARING that, under federal and state law,

plaintiffs are entitled to reasonably use the waters of the Mississippi from the ordinary low water mark to the high water mark as defined by Federal and State law which use includes at the least, the purposes of navigation (including travel and transportation), commerce, boating, sailing, and fishing and hunting from boats;

2) Plaintiffs' request for injunctive relief be DENIED.

3) JUDGMENT be entered in favor of plaintiffs and against the sheriff, finding the arrests of the plaintiffs were without probable cause, in violation of both 42 U.S.C. § 1983 and state law.

4) Further proceedings be held to ascertain the extent of plaintiffs' damages resulting from their illegal arrests.

OBJECTIONS

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.P. 72(b), the parties have ten (10) business days from service of this Report and Recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the district judge at the time of filing. Timely objections will be considered by the district judge before he makes his final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT UPON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UN-OBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED in chambers, in Alexandria, Louisiana, on this the 21st day of April, 2006.

/s/ James D. Kirk
JAMES D. KIRK
United States Magistrate Judge

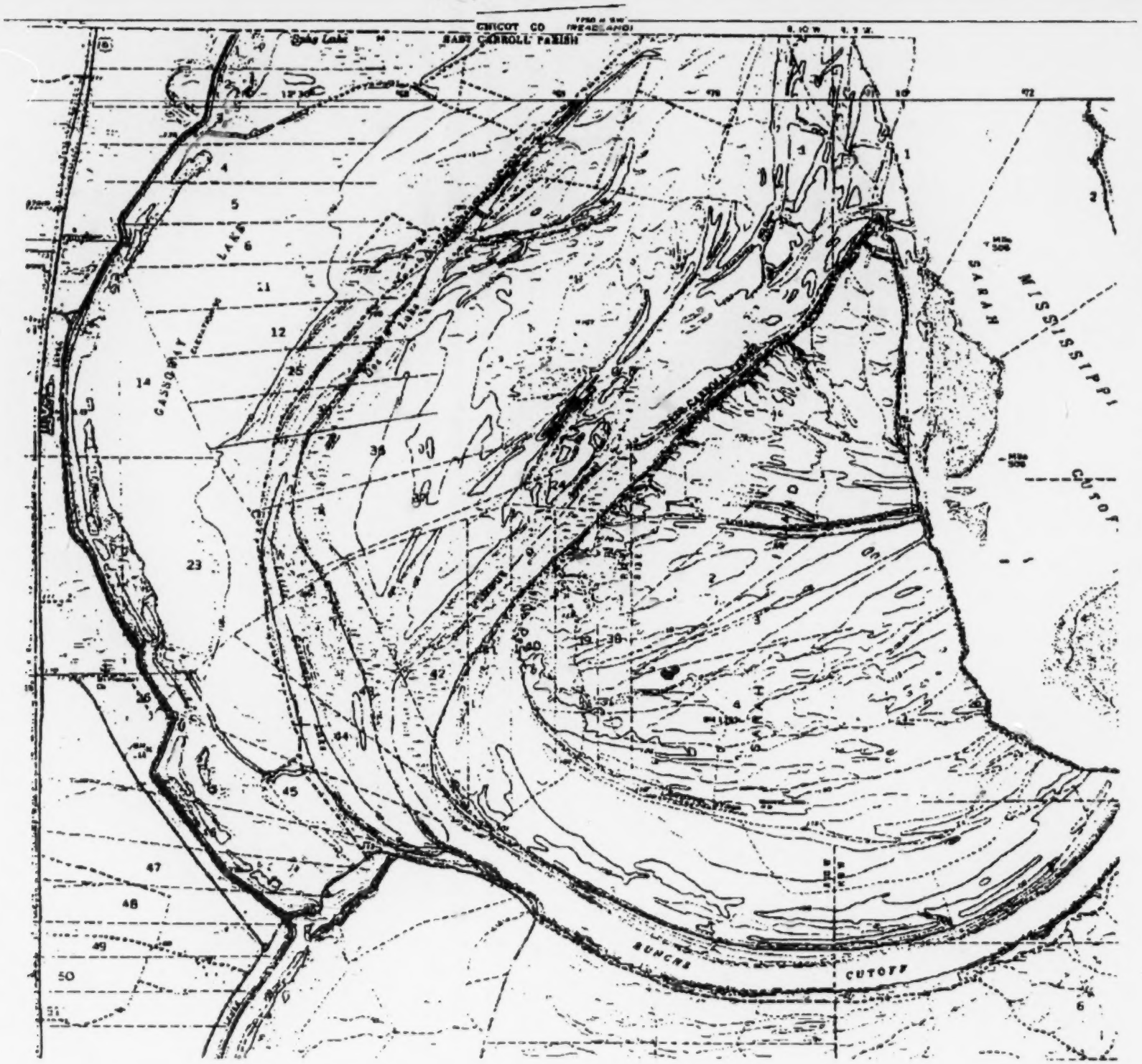

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-31045

NORMAL PARM, JR; HAROLD EUGENE WATTS; ROY MICHAEL GAMMILL; WILLIAM T ROGERS; ROBERT ALLEN BALCH

Plaintiffs-Appellants

v.

MARK SHUMATE, in his official capacity as Sheriff of East Carroll Parish

Defendant-Appellee

Appeal from the United States District Court for the Western District of Louisiana, Monroe

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ON PETITION FOR REHEARING EN BANC

(Filed Jan.28, 2008)

(Opinion 12/28/07, 5 Cir., ___, ___ F.3d ___)

Before KING, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

TITLE 33 – NAVIGATION AND NAVIGABLE WATERS CHAPTER II – CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY PART 329 – DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

§§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR parts 323 and 328.

§§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) Jurisdiction over entire bed. Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

(1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on

the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

* * *

WALKER LANDS, INC. and HOLLYBROOK LAND COMPANY, INC., Plaintiff-Appellee Versus EAST CARROLL PARISH POLICE JURY and THE STATE OF LOUISIANA, Defendants-Appellants

No. 38,376-CA

COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT

38,376 (La.App. 2 Cir. 04/14/04); 871 So. 2d 1258; 2004 La. App. LEXIS 977

April 14, 2004, Judgment Rendered

COUNSEL: LOUISIANA DEPARTMENT OF JUSTICE, By: Gary L. Keyser, Asst. Attorney General, for Appellant, State of Louisiana.

McGLINCHEY STAFFORD, PLLC, By: James C. Crigler, Jr., Constance Charles Willems, for Appellee, Walker Lands, Inc.

PAUL LOY HURD, for Waterways Access Association.

JUDGES: Before BROWN, CARAWAY & PEATROSS, JJ.

OPINION BY: PEATROSS

OPINION

This appeal arises from a trial court judgment in favor of Plaintiff Walker Lands, Inc. ("Walker Lands") and against Defendant State of Louisiana ("State"). The State now appeals the judgment of the trial court. For the reasons stated herein, we affirm in part, reverse in part and remand.

FACTS

On June 10, 1996, Walker Lands filed suit seeking an injunction against the East Carroll Parish Police Jury to stop all public use of Gassoway Lake and a drainage ditch which runs into the lake, both in the vicinity of the Mississippi River. In its lawsuit, Walker Lands also sought a declaratory judgment from the trial court declaring that Walker Lands is the owner of Gassoway Lake and that the lake and the drainage ditch are not subject to any right of public use.[1] Subsequently, the East Carroll Parish Police Jury filed a third-party demand against the State alleging that the State was an indispensable party to the suit, since it had a duty to defend title and access to alleged public lands.[2]

The State answered this lawsuit claiming the ownership and/or servitude to the bed, bottoms and waters of Gassoway Lake and the drainage ditch;[3]

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[1] This lawsuit has previously been before this court. *See Walker Lands, Inc. v. East Carroll Parish Police Jury,* 31,490, 738 So. 2d 205 (La. App. 2d Cir. 3/5/99), unpublished opinion, *writ denied,* 99-1181 (La. 6/4/99), 744 So. 2d 631. The previous decision in this case was our court's reversal of summary judgment which had been granted by the trial court for Walker Lands in determining ownership of Gassoway Lake.

[2] The East Carroll Parish Police Jury was later dropped from the suit. Hollybrook Land Co., Inc. was also an original party to this suit, but was later dismissed as well.

[3] Walker Lands refers to the gully that provides water to Gassoway Lake in times of high water as a drainage ditch. The State refers to the gully as an outlet channel. The pictures of the

(Continued on following page)

and, therefore, Gassoway Lake and the drainage ditch were subject to public use. The State and Walker Lands also claimed ownership of land that the State labels as an island, that sits between the lake and the Mississippi River.

A trial over these matters was held in 1999 and 2001. The trial court received extensive evidence from both parties concerning the creation and ownership of Gassoway Lake. At trial, it was determined that Gassoway Lake did not exist in 1812,[4] the year Louisiana was admitted into the Union. The land where Gassoway Lake now sits was either woods or farmland in 1812, west of the Mississippi River. When the Mississippi River shifted westward before approximately 1880, it flowed over this dry land. When the Mississippi River shifted eastward, private riparian landowners acquired the land, which includes Gassoway Lake and the drainage ditch, and have owned it ever since, with Walker Lands having purchased the land in 1974. Since 1960, all owners of the land and Gassoway Lake have prohibited access to it.

Dr. Richard Kesel, expert for Walker Lands, testified that, based on map evidence, data concerning the course and flow of the Mississippi River and

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gully in the record indicate that a more accurate term for it is a drainage ditch; therefore, this term will be used herein.

[4] By law, the State owns all bodies of water that were in existence within its borders in 1812. *See Texas v. Louisiana*, 410 U.S. 702, 93 S. Ct. 1215, 35 L. Ed. 2d 646 (1973); *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1974).

other information, Gassoway Lake was in existence by 1894. During the 1860s and 1870s, the Mississippi River began moving in a westward direction toward the geographical site now occupied by Gassoway Lake. Dr. Kesel opined that the land was created through alluvion or accretion when the Mississippi River moved slowly and imperceptibly back eastward, leaving behind dry land and what is now Gassoway Lake in a shallow swale.[5] Gassoway Lake is a very shallow lake and its depth has not changed since its formation. Currently, the channel of the Mississippi River is approximately three and a half miles east of Gassoway Lake. Gassoway Lake remains landlocked during most of the year and is practically inaccessible by boat.[6] The lake only receives water when the Mississippi River floods, which causes water to run through the ditch and eventually spilling over into the lake. The drainage ditch runs from the southern end of Gassoway Lake to Bunch's Cutoff, another body of water. At low water, which is at 77 feet, the ditch is mostly dry and the land that sits between the lake and the Mississippi River is mostly dry. A levee on the land blocks the Mississippi River from flooding any more dry land west of Gassoway Lake. At times when the Mississippi River floods, the land owned by

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[5] A swale is a valley or low place; a tract of low and usually wet land. *Webster's Revised Unabridged Dictionary* (1913). A swale is a long, narrow, shallow, natural depression in the land.

[6] The western portion of Gassoway Lake is bounded by the main levee for the Mississippi River.

Walker Lands, including Gassoway Lake, is submerged under the waters of the Mississippi River, below the ordinary high water mark, which is 112 feet, all the way to the base of the levee. When the Mississippi River is not at an elevated state, however, the land and Gassoway Lake remains well above the ordinary low water mark of the Mississippi River.[7]

The trial court found that, according to the 1894 map, Gassoway Lake was formed as a shallow swale. In making such a finding, the trial court rejected the conclusion found in a Louisiana Attorney General Opinion[8] that Gassoway Lake was created as a result of a neck cut-off; the testimony of the State's expert, Dr. Paul Kemp, who opined that Gassoway Lake was created as a result of chute cut-off, as described in La. C.C. art. 503,[9] within the alluvial plain; and that the

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[7] This is an important fact and detrimental to the State's case, because, with respect to rivers and streams, the bed or bottoms of water which the State owns in her sovereign capacity is only the land covered by the water up to its ordinary low water stage. *See State v. Cockrell,* 162 So. 2d 361 (La. App. 1st Cir. 1964), *writ refused,* 246 La. 343, 164 So. 2d 350 (1964); *Esso Standard Oil Company v. Jones,* 233 La. 915, 98 So. 2d 236 (1957). In this case, if the State argues that the land and Gassoway Lake are within the bed of the Mississippi River, then its argument that it owns Gassoway Lake must fail because it is above the ordinary low water mark.

[8] *See* La. Atty. Gen. Op. No. 96-206.

[9] La. C.C. art. 503 provides:

When a river or stream, whether navigable or not, opens a new channel and surrounds riparian land

(Continued on following page)

lake was formed out of the former Mississippi River bed. Dr. Kemp testified that the area where Gassoway Lake is located was the main channel of the Mississippi River in 1881 and that, when the Mississippi River moved eastward, it left alluvion deposits against the west bank of the river, with Gassoway Lake as a feature within the alluvion build up, which cut it off from the Mississippi River, but that it remained a channel for the Mississippi River.

The trial court ultimately rendered judgment in favor of Walker Lands, concluding that Gassoway Lake and the drainage ditch are privately owned by Walker Lands because the lake and ditch are not navigable in fact; and, thus, not navigable in law. In addition, the trial court determined that certain land between Gassoway Lake and the Mississippi River was not an island and was owned by Walker Lands.[10] Further, the trial court found that the State has never claimed this land in the past and cannot now do so. Thereafter, the trial court entered a permanent injunction enjoining the State or the general public-at-large from going on or about Gassoway Lake, the land between Gassoway Lake and the Mississippi River and the drainage ditch which runs into the lake. The State now appeals the judgment of the trial

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making it an island, the ownership of that land is not affected.

[10] Please see the attached map of the property at issue in the appendix at the end of this opinion. This map was entered into evidence at the trial court as Plaintiff's Exhibit 47.

court, raising the following assignments of error[11] (verbatim):

> 1. The trial court erred in its adoption of the final judgment written by Walker which prohibits public navigation on waters of the Mississippi and awards Island No. 1, formed in the Mississippi, to Walker;
>
> 2. The trial court erred in disregarding all relevant and competent evidence and in rendering a judgment contrary to the law of Louisiana and long standing public policy;
>
> 3. The trial court erred in refusing to grant the State a suspensive appeal where all procedures were followed, and the trial court simply nullified the request without consent of the parties and a hearing; and
>
> 4. The trial court erred in maintaining a TRO in effect from 1996 to present, despite the reversal of a prior judgment by the Court of Appeal, Second Circuit and remand to the trial court for a full trial.

DISCUSSION

It is well settled that a court of appeal should not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. *Stobart v. State through Dept. of Transp. & Development,* 617

[11] The State makes more specific arguments in its brief.

So. 2d 880 (La. 1993). The reviewing court must do more than just simply review the record for some evidence which supports or controverts the trial court's findings; it must, instead, review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. *Id.* The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. *Cosse v. Allen-Bradley Co.,* 601 So. 2d 1349 (La. 1992). If the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. *Housley v. Cerise,* 579 So. 2d 973 (La. 1991) (quoting *Sistler v. Liberty Mutual Ins. Co.,* 558 So. 2d 1106 (La. 1990)).

The State asserts that the evidence at trial showed that Gassoway Lake was created out of the former bed of the Mississippi River, it remains navigable and connected to the Mississippi River as a channel and is public water under the law. Further, the State contends that, when Gassoway Lake is below the ordinary high water of the Mississippi River, it is burdened by a navigation servitude, levee servitude and the public use. The State also charges that the trial court's judgment is overly broad.

Creation of Gassoway Lake

The central issue involved in this case is the creation of Gassoway Lake and the effect of the movement of the Mississippi River. La. C.C. art. 499 provides:

> Accretion formed successively and imperceptibly on the bank of a river or stream, whether navigable or not, is called alluvion. The alluvion[12] belongs to the owner of the bank, who is bound to leave public that portion of the bank which is required for public use.

The same rule applies to dereliction formed by water receding imperceptibly from a bank of a river or stream. The owner of the land situated at the edge of the bank left dry owns the dereliction.

Any alluvion and/or dereliction which forms along the banks of a river belongs to the riparian landowners, who own the land adjacent to the river, when the river shifts course. *Nevels v. State,* 95-0100 (La. App. 1st Cir. 11/9/95), 665 So. 2d 26; *Davis Oil*

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[12] Alluvion may be defined as an addition to riparian land, gradual and imperceptible, made by the water to which the land is contiguous. The test as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. *Esso Standard Oil Company, supra.*

Company v. Citrus Land Company, 576 So. 2d 495 (La. 1991). Moreover, La. C.C. art. 504 provides:

> When a navigable river or stream abandons its bed and opens a new one, the owners of the land on which the new bed is located shall take by way of indemnification the abandoned bed, each in proportion to the quantity of land that he lost.
>
> If the river returns to the old bed, each shall take his former land.

At trial, it was established that Walker Lands' predecessors-in-title were the riparian landowners of the property that sat at the bank of the Mississippi River when it changed course sometime after 1880 and began shifting back eastward, leaving behind dry land and standing water in a shallow swale in the land, what is now Gassoway Lake. Walker Lands' predecessors-in-title began to acquire, through alluvion,[13] new land that was created, when the Mississippi River shifted east. Dr. Kesel explained that Gassoway Lake was part of this creation of new land as the Mississippi River shifted eastward.

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[13] Alluvion and accretion are terms used synonymously. Accretion is defined as the act of growing to a thing; usually applied to the gradual and imperceptible accumulation of land by natural causes, as out of the sea or river. *Black's Law Dictionary* 20 (6th ed. 1990). Accretion is the addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of owner. The term alluvion is applied to the deposit itself, while accretion denotes the act.

Gassoway Lake and surrounding lands between the lake and the river are sometimes flooded by the Mississippi River. Privately owned land does not become part of a navigable body of water when a nearby navigable body of water overflows its normal bed and temporarily covers the property. *Edmiston v. Wood,* 566 So. 2d 673 (La. App. 2d Cir. 1990); *Buckskin Hunting Club v. Bayard,* 03-1428 (La. App. 3d Cir. 3/3/04), 868 So. 2d 266, 2004 La.App. LEXIS 431, 2004 WL 385387. Gassoway Lake is landlocked and does not now lie in the bed of the Mississippi River, which is some three and one-half miles to the east; likewise, it is not a channel of the river, since it is cut off from it. Further, since Gassoway Lake is not a channel of the Mississippi River, the dry land between it and the Mississippi River is not an island, as claimed by the State. When the land that is now Gassoway Lake sat in the bed of the Mississippi River, the river bed was owned by the State as the bed of the Mississippi River and not as the bed of a separate navigable lake. The land and the lake, however, no longer sit in the bed of the Mississippi River.

We find that the land surrounding Gassoway Lake was formed through accretion/alluvion as the Mississippi River shifted course. Gassoway Lake formed due to water left behind in a swale in the land when the river shifted eastward. We note that the depth of the lake has not changed since its formation. This evidence supports the conclusion that the lake was formed in a swale and not through a chute or

neck cut-off. Applying La. C.C. art. 499 to the facts in the instant case, we further find that, as owners of the bank of the Mississippi River, Walker Lands' predecessors-in-title gained ownership of not only the newly formed dry land, but also the lake itself. The trial court heard the testimony of both Dr. Kesel and Dr. Kemp and found Dr. Kesel's theory of the shift in the Mississippi River and creation of Gassoway Lake to be more credible. After reviewing the evidence in its entirety, we find that the trial court's conclusion was a reasonable one. The trial court did not commit manifest error, nor was it clearly wrong in determining the manner in which Gassoway Lake was created.

Navigability and Ownership of Gassoway Lake

First, we note that the State cannot claim ownership of Gassoway Lake by basing its argument on La. R.S. 9:1101, as it asserts in its brief. La. R.S. 9:1101 provides, in pertinent part, that "The waters of all bayous, rivers, streams, lagoons, lakes and bays and the beds thereof, not under the direct ownership of any persons on August 12, 1910, are declared to be the property of the state." Walker Lands proved at trial that its predecessors-in-title owned the land encompassing Gassoway Lake on August 12, 1910. We find no merit in the State's argument in this regard. We also find no merit in the argument that the State owns Gassoway Lake because the State owns all bodies of water that were within its territory when it was admitted into the Union in 1812. Gassoway Lake

did not exist in 1812; and, consequently, this law would not apply.

Since the State only owns navigable bodies of water, it argues that Gassoway Lake and the drainage ditch are navigable. "Non-navigable lakes are private things. Accordingly, they may belong to . . . a private person." La. C.C. art. 506 cmt. c. A body of water is navigable in law if it is navigable in fact. *Ramsey River Road Property Owners Association, Inc. v. Reeves,* 396 So. 2d 873 (La. 1981). A body of water is navigable in fact if it is capable of being used for a commercial purpose over which trade and travel are or may be conducted in the customary modes of trade and travel. *Id.*

Non-navigable lakes are subject to the law governing dry lands. See La. C.C. art. 506 cmt. d. La. R.S. 9:1115.2 provides:

> A. Inland non-navigable water bodies are those which are not navigable in fact and are not sea, arms of the sea, or seashore.
>
> B. Inland non-navigable water beds or bottoms are private things and may be owned by private persons or by the state and its political subdivisions in their capacity as private persons.

Whether or not Gassoway Lake and the drainage ditch are navigable as they normally sit when they are not flooded by the Mississippi River depends on whether they are used in commerce. The trial court found that Gassoway Lake and the drainage ditch

were not navigable and we find no manifest error in that conclusion. At trial, the State attempted to prove that Gassoway Lake and the drainage ditch can be used for commercial purposes. The trial judge properly rejected this argument.

A body of water not connected to a navigable body of water and surrounded by land can serve no useful commercial purpose. *Fitzsimmons v. Cassity,* 172 So. 824 (La. App. 2d Cir. 1937). In *Fitzsimmons,* a shift in the Red River caused a shallow body of water to be left behind. This body of water had no connection with the Red River. The court found that the body of water "partakes more of a character of a shallow lake than it does a navigable stream" and it was owned by the private landowner and not the State.

In the case *sub judice,* the State argued that the rental of boats for fishing and other recreational purposes on Gassoway Lake was enough to find that the lake was being used for a commercial purpose to support navigability. Further, the State argued that the drainage ditch was navigable in fact. Recreational use of a body of water alone is not enough to say that the body of water is being used for a commercial purpose. Gassoway Lake is a non-navigable body of water that is owned by a private entity. It is a private thing. Moreover, the evidence in the record supports the conclusion that the drainage ditch remains completely dry for most of the year, making it unusable. The drainage ditch also cannot be used for a commercial purpose and it is a private thing. The trial court

did not commit manifest error and was not clearly wrong in finding that Gassoway Lake and the drainage ditch are not navigable bodies of water. Along with the land at issue before the trial court, Gassoway Lake and the drainage ditch are owned by Walker Lands and not the State.

Injunction

First, the State argues that the judgment is overly broad because it enjoins use of the Mississippi River. We do not agree. We have reviewed the specific language of the injunction and find that it does not enjoin use of the Mississippi River, which is obviously a public body of water and no one can prevent boaters from navigating it; however, the permanent injunction must fail on other grounds.

Although the issue of standing has not been raised on appeal, we must consider this issue since it is fundamental to the granting of relief, such as the issuance of an injunction. *Louisiana Dept. of Agriculture and Forestry v. Louisiana State Licensing Board for Contractors,* 36,694 (La. App. 2d Cir. 1/29/03), 837 So. 2d 726. Justiciable controversy has been defined as:

> "[a]n actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relation of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a

> legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Atchafalaya Basin Levee District v. Pecquet,* 364 So.2d 610 (La. App. 1st Cir. 1978).

A justiciable controversy is shown if there is a genuine controversy between a plaintiff and a defendant as to legal rights requiring a judicial determination. *Louisiana Dept. of Agriculture and Forestry, supra.*

In addition, under La. C.C.P. art. 3611, enforcement of an injunction is punishable as a "contempt of court." Such a contempt judgment, however, may only be obtained against the party/defendant against whom the action for injunction was brought.

In the case *sub judice,* Walker Lands and the State were the only parties involved in this lawsuit at trial and no other persons or private entities were involved; however, the trial judge issued a permanent injunction against not only the State's use of the property, but also the public's-at-large use of the property. The trial judge ordered, adjudged and decreed, in pertinent part, that:

> [T]he State of Louisiana, and its subdivisions or agencies, and any employee, juror, or agent thereof, and all other persons, including members of the public, (all these persons collectively "Persons"), be and are hereby permanently enjoined from entering upon the Property . . . , which Property includes

> all lands . . . and the bed, bottoms and waters of Gassoway Lake . . . whether or not any of the lands or water bodies on the Property are inundated by flood waters from the Mississippi River or any other water body, for any purpose whatsoever,. . . .
>
> All said Persons are further permanently enjoined from a) engaging in any conduct or activity which directly or indirectly encourages or permits other Persons, including members of the general public, to enter upon the Property described above, without Walker's or its successors-in-title express prior authorization; and b) from using such Property or authorizing, causing or encouraging anyone, other than Walker or its successors-in-title and their agents, invitees and licensees from using the Property, including the bed, bottoms and waters of Gassoway lake and the water body, (whether called a ditch, bayou, or outlet channel or otherwise) . . . for any purpose whatsoever,. . . .
>
> All said Persons are further permanently enjoined from using any portion of the Property, including the lands and any bed, bottoms and waters of any water bodies thereon, for any purpose whatsoever, unless they have express prior authorization of Walker or its successors-in-title.

Walker Lands cannot be given relief against a hypothetical public-at-large. It cannot have an injunction enforced against every individual person in the state when there is no actual dispute against

every individual person in the state. There is no genuine controversy between Walker Lands and every person in the State of Louisiana. After thorough research, we found no law or jurisprudence in this State that supports the conclusion that an entire hypothetical public-at-large can be enjoined by a court from doing an act.

Further, we find that there is no direct evidence in the record of any direct violation by State officials or departments of the State attempting to invade Walker Lands' property; and, therefore, there is no justiciable controversy between Walker Lands and the State that would warrant an injunction being issued against the State. Simply put, there is no genuine controversy between Walker Lands and the State over the issue of injunctive relief. Walker Lands does, however, have a right to prevent its private property from being exploited. It has the same rights as all other owners of private property against a person or entity who invades its land and that is to enforce its rights as a private landowner through use of the trespass statutes, to seek specific damages against a person or entity or to ask for an injunction against a specific person or entity, but only at the time that the person or entity invades its land.[14] Owners of private property may forbid entry to anyone for purposes of hunting or fishing and the like.

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[14] For example, *see Cenac v. Public Access Water Rights Association*, 02-2660 (La. 6/27/03), 851 So. 2d 1006; *Buckskin Hunting Club, supra*.

La. C.C. art. 3413. We hereby reverse the permanent injunction issued by the trial court.

Public Use Servitude

Finally, in support of its argument for ownership, the State raised the issue of the existence of legal public servitudes under La. C.C. art. 665[15] in favor of itself and the general public for the utility of the Mississippi River banks at times of high water and for levee maintenance purposes. The Civil Code's definition of the bank of a navigable river is the land lying between the ordinary low and the ordinal high stage of the water. See La. C.C. art. 456. The State, however, has not presented a justiciable controversy in this case showing that the State, through its agents in its propriety capacity, seeks to utilize any rights to these public servitudes. We likewise, therefore, pretermit discussion of the available use of these legal public servitudes during times of high water.[16]

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[15] La. C.C. art. 665 provides:

> Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

All that relates to this kind of servitude is determined by laws or particular regulations.

[16] We do note that the jurisprudence in our state has long held that the public use servitude means that the public may use the bank of a river only for a navigational purpose. *See* La. C.C. art. 456 cmt. b; *Ward v. Board of Levee Com'rs of Orleans*

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Devolutive Appeal and Temporary Restraining Order

The State also argues that the trial judge unilaterally converted its motion for a suspensive appeal into a devolutive appeal. Further, the State asserts that the temporary restraining order (TRO) put into effect by the trial judge in the first decision in this case, which was later reversed by this court, should not have stayed in effect after the reversal.

First, we will address the devolutive appeal. A trial judge has discretion to issue a devolutive appeal. See La. C.C.P. art. 3612. In the instant case, the State requested a suspensive appeal, or in the alternative, a devolutive appeal. When the State submitted a draft order for the trial judge to sign, however, it mentioned only a suspensive appeal in the draft order. The trial judge marked out the word suspensive and wrote in devolutive, using the discretion allowed to him under our code of civil procedure. We find no merit to the State's third assignment of error.

Finally, the State claims that the TRO should not have remained in effect after the original decision was reversed by our court. In reviewing the record,

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Levee District, 152 La. 158, 92 So. 769 (1922), *cert. denied,* 260 U.S. 745, 43 S. Ct. 246, 67 L. Ed. 492 (1923); *Jefferson Parish v. Universal Fleeting Company,* 234 So. 2d 88 (La. App. 4th Cir. 1970). Fishing and hunting on flooded lands do not meet the definition of using the bank of a river at its high water mark for a navigational purpose. *See State v. Barras,* 615 So. 2d 285 (La. 1993); *Warner v. Clarke,* 232 So. 2d 99 (La. App. 2d Cir. 1970), *writ refused,* 255 La. 918, 233 So. 2d 565 (1970).

we found that the parties had agreed to maintain the TRO until the trial court rendered a decision over the merits of the permanent injunction. Likewise, we find no merit in the State's final assignment of error.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed as to the ruling that Gassoway Lake and its surrounding lands are owned by Walker Lands. The judgment of the trial court is reversed as to the permanent injunction. Costs of this appeal shall be divided equally between the parties. The total cost of this appeal was $167.50, of which half shall be assessed against the State of Louisiana through the Department of Justice, pursuant to La. R.S. 13:5112. The matter is remanded to the trial court for the calculation of trial court costs to be assessed equally against the parties.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX

MISSISSIPPI
RIVER
MILLIKIN QUAD
LOUISIANA-MISS
15 MINUTE SERIES

U.S. Geological Survey Map
MILLIKIN QUADRANGLE
Louisiana-Mississippi
7.5 Minute Series (Topographic)
(East Carroll Parish, Louisiana)

[Map Found In Pocket On Inside Back Cover]

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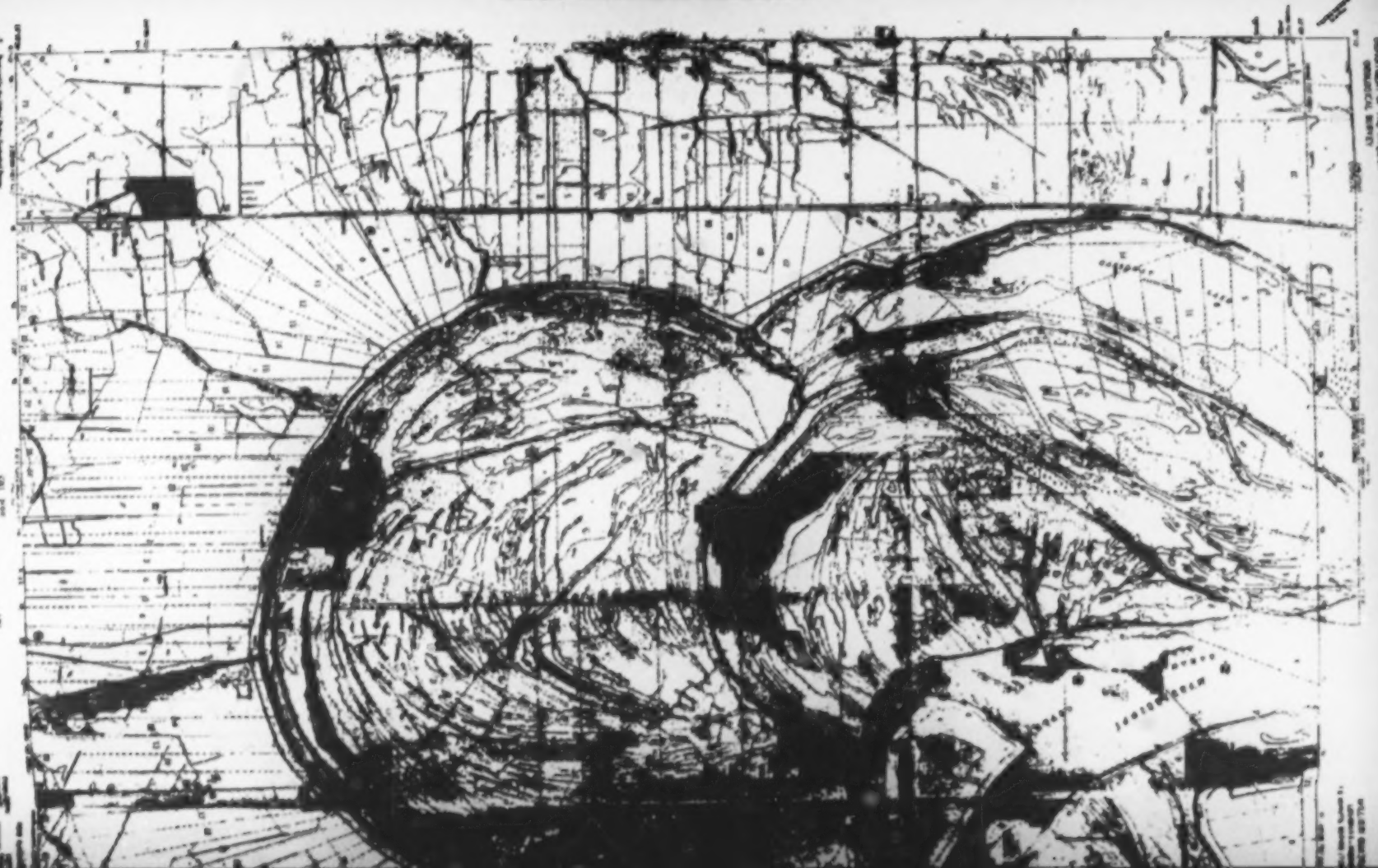

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No. 07-1289

Supreme Court, U.S.
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In The

Supreme Court of the United States

NORMAL PARM, JR., ET AL.,

Petitioners,

v.

MARK SHUMATE, in his official capacity as Sheriff of East Carroll Parish, Louisiana,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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INTRODUCTION

This case involves matters of trespass on non-navigable private land that is occasionally flooded by waters from the Mississippi River. Petitioners assert that they have a right to trespass under the guise of a previously unrecognized constitutional right to fish. This case does not merit review because it involves fact-intensive matters of Louisiana state law and because the decision below does not conflict with any decision of any other federal court of appeal, is not in conflict with a decision of a state court of last resort and does not conflict with any prior decisions of this Court. This case rests and turned on established principles of law applied to a particular set of facts which were painstakingly developed and carefully analyzed not only in this case, but in ten years of related litigation in the Louisiana state courts. The Petition thus lacks a basis for the exercise of this Court's jurisdiction. The decisions below should not be disturbed. The respondent, a Sheriff of a single Parish in rural Louisiana who has borne the brunt of defending Petitioners' claims, respectfully urges this Court to deny the Petition.

STATEMENT OF THE CASE

The Petitioners are a group of recreational fishermen who were arrested for trespass in Louisiana when they refused to leave private property owned by Walker Cottonwood Farms, L.L.C., successor in

interest to Walker Lands, Inc. The Petitioners postulate that the respondent East Carroll Parish Sheriff Mark Shumate is prohibiting them and all others from fishing or otherwise enjoying the Mississippi River. That is simply not the case. This property is undeniably private property that is dry most of the year and is replete with roadways, buildings, crop land, small lakes, ponds, and standing timber that preclude its use as a navigable waterway or highway of interstate commerce. *See Walker Lands, Inc. v. East Carroll Parish Police Jury*, 38,376, 871 So.2d 1258 (La. App. 2nd Cir. 4/14/2004), *writ denied*, 2004-1421, 916 So.2d 127 (La. 6/3/2005);[1] *Parm v. Shumate*, 513 F.3d 135, 138, 139-140 (5th Cir. 2007).[2] Although a small part of the property at issue borders the navigable channel of the Mississippi River, the property extends in some places three miles from the "top bank" of the river as shown on the 1998 U.S. Corps of Engineers' official Navigation and Flood Control Map, submitted as evidence by the Sheriff.[3] In short, the

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[1] This opinion is also reproduced at Pet. App. pp. 101-122.

[2] The opinion below, also reproduced at Pet. App. pp. 1-22.

[3] This map was entered in evidence as defendant's Exhibit J, and is attached hereto as an Appendix inside the back cover of this Brief, with a legend showing the key for the "top bank" appearing on the reverse side. It is noted that the defense exhibit is more recent than the map offered by the plaintiff, as noted at oral argument in the district court. The Petitioners' map is vintage 1994, but indicates that it is based on 1967 imagery that was last field-checked in 1970.

property is not "the River," as the Petitioners would have the Court believe.

As privately owned property above the federal high-water mark, the Walker property is not subject to the federal navigational servitude. Additionally, the Louisiana courts have specifically held that this property is non-navigable, non-public trust lands, even when flooded by the backwaters of the Mississippi River during times of high river stages at certain times of the year. Under these conditions, the use of the property, even when flooded, remains governed by state law. The courts below properly found, under the facts of this case and the particular circumstances presented, that the Petitioners have no right under state or federal law to go upon the property to fish or hunt.

The Petitioners assert various legal theories in support of their asserted federal "right" to fish. Their reliance is uniformly misplaced. These authorities are concerned with rights of navigation in commerce preserved under federal law and confirm that regulation of the property at issue rests in the State. It is not disputed that commercial navigation rights exist on the Mississippi River, which passes near the property at issue. It is equally without question, however, that the actions of the landowner in seeking the Sheriff's protection from trespass do not interfere with traditional uses of the River as a highway of commerce.

The property rights Walker has asserted do not extend below the high bank of the River as established under federal regulations. The use of this property is governed therefore by Louisiana state law. What gave rise to the Petitioners' claims was their invasion of private property three miles inland from the Mississippi River that occasionally receives flood waters of the River. The Sheriff simply enforced the property rights of a complaining private land owner, rights which are clearly and explicitly protected by the constitutions and laws of the United States and of Louisiana. Any interests the Petitioners may have in recreational fishing must yield to these private property rights.

ARGUMENT

I. NEITHER THE UNITED STATES CONSTITUTION NOR FEDERAL LAW OFFER PROTECTION FOR RECREATIONAL FISHING ON FLOODED PRIVATE PROPERTY IN LOUISIANA

The Petitioners claim a federally protected right to recreational fishing on the Walker property. But they can point to no specific statute or constitutional provision that specifically creates such a right. The applicable statutes and constitutional provisions, along with the cases decided thereunder, instead confirm that Petitioners' interest in unchecked recreational fishing is not of federal concern.

The United States Constitution, in the context of this litigation, is concerned only with the regulation of interstate commerce and the preservation of navigable bodies of water, such as the shipping channel of the Mississippi River, as highways of commerce. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988). To the extent that state laws governing property rights do not infringe upon such use, federal law does not usurp state law, even to protect recreational fishermen floating on flooded private property. *Id.* at 795, 798-799 (recreational fishing rights "have nothing to do with navigation . . . "). Here, the actions of the Sheriff in arresting the Petitioner fishermen had no relation to the use of the Mississippi River as a highway of commerce. To the contrary, the undisputed facts show that the Petitioners were arrested well beyond the legally navigable and protected channel of the Mississippi River.

The definition of high water mark is stated in federal law as "the line[s] on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas." 29 C.F.R. 329.11(A)(1). The state court decisions in the parallel proceeding observed that the Walker property has all of the distinguishing elements of land that sits above the high water mark for

federal purposes.[4] In addition, as shown on the federal navigation map submitted at the summary judgment hearing as Exhibit J by the Sheriff, the "top bank" of the western bank of the Mississippi River in the vicinity of the subject property is right alongside the regular channel of the river, and does not extend far, if at all, onto the subject property in Louisiana at its very northeastern corner. The Petitioners were arrested on the Walker property several miles west of the delineated "top bank."

Thus defined, the bed of the navigable River and the extent of a federal right to fish (even if one exists) would not extend over the Walker property, which, as found by the state courts, is ordinarily dry riparian land that is "not wrested of its vegetation" despite being occasionally exposed to flood water from the River. *See Walker Lands, supra*; *see also U.S. v. C. E. Harrell*, 926 F.2d 1036, 1041-1042 (11th Cir. 1991); *and Goose Creek Hunting Club, Inc. v. U.S.*, 518 F.2d 579, 583 (Ct. Cl. 1975). In fact, courts have explicitly rejected attempts to expand the beds of navigable rivers, and concomitantly the federal navigational servitude, to riparian lands only inundated at a "river's peak flow or flood stages." *Harrell*, 926 F.2d at 1041, *citing Oklahoma v. Texas*, 260 U.S. 606, 43 S.Ct. 221, 224, 67 L.Ed.2d 428 (1923).

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[4] The state district court opinion is summarized and referenced in the Fifth Circuit decision below. *Parm*, 513 F.3d at 139-140 (*see* Pet. App. at 7-9). The state appellate decision appears at Pet. App. pp. 101-122, as well as at 871 So.2d 1258.

There is no question that the bed of the Mississippi River is navigable where it passes near the Walker property. Any navigational servitude that may apply to the River, however, would be limited to the bed of the River, and then only for use as a continuous highway of interstate commerce as authorized by the Commerce Clause of the U.S. Constitution. *See Dardar v. Lafourche Realty Co., Inc.*, 985 F.2d 824, 832 (5th Cir. 1993); *citing Kaiser Aetna v. United States*, 444 U.S. 164, 178, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979). This servitude is not unlimited. It does not grant recreational fishing rights over flooded private property. *See Scranton v. Wheeler*, 179 U.S. 141, 160, 21 S.Ct. 48, 56, 45 L.Ed. 126 (1900) ("It is commerce, and not navigation, which is the great object of constitutional care. The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more the regulation and control of them for purposes of commerce.").

This Court has long recognized that "the title and rights of riparian or littoral proprietors in the soil below the high-water mark of navigable waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United

States by the constitution." *Shively v. Bowlby*, 152 U.S. 1, 40, 14 S.Ct. 548, 563, 38 L.Ed. 331 (1894). The "rights granted to the United States by the Constitution" in this respect include only rights of commercial navigation and to keep the navigable highways of commerce open. This Court recognizes that issues of public rights in access to waterways "not related to navigability, such as bathing, swimming, recreation, fishing, and mineral development . . . ," are matters of state law concern. *See Phillips Petroleum*, 484 U.S. at 482-484, 108 S.Ct. at 798-799.

A distinction exists between the navigation protected by federal law and the private hunting and fishing promoted by the Petitioners. Navigation as contemplated by the Constitution is commerce. The Petitioners' recreational fishing and hunting are pleasurable distractions. The former is essential to the public interest and is protected by the Constitution, laws, and regulations of the United States; the latter are not. *See George v. Beavark*, 402 F.2d 977, 979-981 (8th Cir. 1968) (" . . . none of the authoritative cases has liberalized the rule so as to indicate that mere pleasure fishing on a stream of water is such usage as would constitute navigability.").

Consequently, even if the federal navigational servitude extended three miles beyond the bank of the Mississippi River (it does not) *and* encompassed the portion of the Walker property at issue (it does not), it would not protect the unlawful fishing practices of the Petitioners on private property. Any common rights to the simple enjoyment of navigable

waterways were retained by the States as sovereigns, not transferred to the federal government by the Equal Footing Doctrine. The States, upon entry into the Union, granted specific and limited authority to preserve and protect navigation in commerce to the federal government by way of the Constitution:

> At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States. . . . The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.

Phillips Petroleum, 484 U.S. at 473-474, 108 S.Ct. at 98 L.Ed.2d 877; *citing Shively*, 152 U.S. at 57, 14 S.Ct. at 569.

This Court has confirmed that "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to regulate private rights in such lands as they see fit." *Phillips Petroleum*, 484 U.S. at 475, 108 S.Ct. at 794; *citing Shively*, 152 U.S. at 26, 14 S.Ct. at 557. Lands under navigable waterways were "given to the States upon their entry into the Union, subject to the federal navigation easement and the power of

Congress to control navigation on those streams under the Commerce Clause." *Phillips Petroleum*, 484 U.S. at 479, 108 S.Ct. at 797 (citation omitted). The title to and rights in such lands and waterways are then matters left to state law, which this Court recognized may be different among the several States. *See Phillips Petroleum*, 484 U.S. at 483, 108 S.Ct. at 799; *quoting Shively*, 152 U.S. at 26, 14 S.Ct. at 557 ("there is no universal law on the subject: but . . . each State has dealt with the lands under tidewaters within its borders according to its own views of justice and policy.").

Even if the Walker property were considered tidelands or public trust lands governed by the Equal Footing Doctrine,[5] Louisiana, as sovereign, has the authority to make such laws respecting private rights in that property as it sees fit, as long as the federal interests in commercial navigation are not impaired thereby. The decision rendered below by the Fifth Circuit did not hold that recreational fishing is not permitted on navigable waterways. What the Fifth Circuit found, based on established precedent, was that federal law on the subject of navigable waterways is concerned with navigation on said navigable waterways as highways of commerce. Fishing rights

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[5] *See Walker Lands*, 871 So.2d at 1261, Pet. App. at 103 ("At trial, it was determined that Gassoway Lake did not exist in 1812, . . . the year Louisiana was admitted into the Union. The land where Gassoway Lake now sits was either woods or farmland in 1812, west of the Mississippi River.").

as may be protected by a State as the sovereign, on the other hand, are matters of state law.

A variation of this premise was recognized in the *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1873), which involved a challenge to Louisiana state laws that granted exclusive rights to slaughter-house operations along sections of the Mississippi River at New Orleans to a private entity. This Court held that the grant of exclusive rights in land above the low water mark of the River to private interests did not violate the Constitution or Louisiana's grant of authority over commercial navigation to the federal government.

In *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir. 1931), the court addressed rival claims of glass-bottomed boat operators on beautiful Silver Springs, undisputably a navigable highway of interstate commerce protected by federal law. The court held that this navigable waterway could not be claimed as the exclusive waterway of one of the excursion operators by virtue of its ownership of adjacent lands. The Walker property, in contrast, is not the bed of a federal highway of water-borne commerce, it is "fast" land, not subject to the federal servitude or the holding of *Silver Springs*. *See Silver Springs*, 50 F.2d at 358 ("Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water.").

Other cases noted by the Petitioners recognize that the individual States have the authority to regulate the disposition and use of non-navigable property adjacent to navigable waterways. *See Lawton v. Steele*, 152 U.S. 133, 138, 14 S.Ct. 499, 501, 38 L.Ed. 385 (1894) (the preservation of game and fish fall within the ambit of the State's police power "and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts."); *Merrill-Stevens Company v. Durkee*, 62 Fla. 549, 560, 57 So. 428, 432 (Fla. 1912) (a State may transfer ownership in whole or in part of land beyond the edge of a navigable channel to private interests, "leaving full space for the requirements of commerce," but reserving to the private owners the right to make whatever constructions on the property they desired "and also the right to prevent encroachments of any other person upon all such submerged lands . . . , . . . and to have and maintain action of trespass in any court of competent jurisdiction in the state, for interference with such property.") (citation omitted); *Martin v. Waddell's Lessee*, 41 U.S. 367, 411, 16 Pet. 367, 10 L.Ed. 997 (1842) (following the American Revolution, the States have sole authority over property rights, including those related to aqueous property, subject only to the rights surrendered by the States through the Constitution to the federal government.); *see also* 33 U.S.C. 10.

Although the Equal Footing Doctrine guarantees that the lands underlying navigable waterways when a State entered the Union are to be held as "common highways . . . forever free . . . ," this doctrine pertaining to navigable waterways "was never intended to apply to streams only capable of an imperfect navigation in time of floods and very high water. Such streams or dry bayous must be considered as under the entire control of the State." *Boykin v. Shaffer*, 13 La. Ann. 129, 1858 WL 5070, at 2 (La. 1858).

The Louisiana Supreme Court in *Boykin* held that a private company could be authorized by the State to construct locks and other improvements on a bayou that was only occasionally navigable and held that the private company's restrictions on navigation through its locks were authorized by Louisiana law. The *Boykin* decision also found that the Equal Footing Doctrine did not prohibit the privatization of the bayou passage because the waterway was non-navigable to start with, and thus the State had the authority to alienate it in full or in part to private persons. The Louisiana Supreme Court observed that "Were the mere fact that a steamboat or flatboat had been a short distance up a stream or bayou in high water a sufficient ground for declaring it a navigable stream, every slight depression of the soil on the banks of the Mississippi would then become a navigable stream and should be opened for the benefit of rafts and boats, and the convenience of a few persons, to the total destruction of the planting interests on the banks of the river." *Id.* at 2. The Louisiana

Supreme Court rejected the notion that occasional flooding of private, non-navigable property authorizes the exercise of the sort of activities sought to be pursued by the Petitioners on the Walker property.

The Equal Footing Doctrine calls for state, not federal, regulation of fishery. This state regulation does not offend the Commerce Clause or federal admiralty or maritime jurisdiction. *See Smith v. Maryland*, 59 U.S. 71, 74-75, 18 How. 71, 15 L.Ed. 269 (1855) (the seizure of a commercial oyster boat for using dredging instruments in violation of state law did not violate the federal constitution, recognizing that a State may regulate the enjoyment of certain public rights, among which is the right to fish).

The Petitioners misconstrue the holding of the Fifth Circuit below. The Fifth Circuit did not address or limit in anyway the use of the navigable Mississippi River by anyone for any lawful purpose. To assert that tugboat operators and the weekend angler will now be subject to interrogation concerning their use of the navigable waterways is absurd. This case involved flooded, but non-navigable,[6] property that is unquestionably owned by a private person. The holding of the Fifth Circuit only applies to such property in Louisiana. The law recognizes that the

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[6] The Louisiana state courts, in a proceeding that lasted the better part of a decade, determined that the Walker property, even when flooded, is non-navigable. *See Walker Lands, Inc., supra.*

several States may treat similar property differently. The U.S. Constitution does not mandate uniformity in such state laws, except to the extent that such state laws may improperly impede commercial navigation.

Arguments made by the *Amici* group[7] supporting the Petitioners illuminate the dangerous extent of the Petitioners' sought-after usurpation of private property rights. These *Amici* suggest that the private property at issue should be available to all "for purposes of fishing, hunting, bird-watching, canoeing and kayaking, wildlife observation, and communing with nature." *See* Coalition *Amici* Brief, at page 5. This proposition would allow anyone to traipse across private property for any activity under the sun. Private property rights of a landowner would have no meaning. In addition, not only do the Petitioners and their *Amici* want to go wherever the water goes, apparently they expect to utilize any property "in proximity to such waters . . . " *See* Coalition *Amici* Brief, at page 6. If, as argued by the Petitioners and their *Amici*, "several millions of individuals" may intrude upon private property "for fishing, paddling, nature observation, and countless other activities"[8] with no regard for the private owners' rights, what's a property owner to do?

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[7] Identified as "A Coalition of Conservation, Wildlife, Fishing, and Wetlands Organizations Led by Restore Our Water Access, Inc." (the "Coalition").

[8] *See* Coalition *Amici* Brief, at pp. 7-9.

Far from "the greatest enclosure initiative ever seen in relation to the waters of the United States,"[9] the decision below only confirmed what has long been settled: a private landowner has the right to maintain an action for trespass by uninvited and unwanted persons. The Petitioners have an incalculable expanse of existing public areas where they may pursue whatever enjoyable pursuits they can envision (as long as it does not interfere with navigation). They are not losing *anything* with the Fifth Circuit's decision. The Fifth Circuit merely confirmed that persons without a claim to ownership may not have free and unabated access to private property under the cloak of an illusory federal "right to fish."

The property rights asserted by the private landowner herein, on the other hand, are far more than "illusory,"[10] as characterized by the Coalition *Amici*. The United States Constitution protects a citizen's property rights, as does the Louisiana Constitution. Recognition of a federal right to fish would critically impair these property rights. The Petitioners' plea to do so should be rejected.

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[9] *Id.* at page 8.

[10] *Id.* at page 23, n. 4.

II. THE PRIVILEGES AND IMMUNITIES CLAUSE DOES NOT PROTECT RECREATIONAL FISHING ON FLOODED PRIVATE PROPERTY

The Privileges and Immunities Clause of the United States Constitution[11] ensures that the citizens of any State in the Union shall enjoy the same rights in other States as do the residents of those other States.

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the

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[11] *See* U.S. CONST. art 14, sec. 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ").

> citizens of the United States one people as this.

Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 380-381, 98 S.Ct. 1852, 1858-1859, 56 L.Ed.2d 354 (1978); *quoting Paul v. Virginia*, 8 Wall. 168, 180, 19 L.Ed. 357 (1869); *see also Slaughter-House Cases*, 83 U.S. at 78-79 (the privileges and immunities protected by the Constitution "are those which belong to the citizens of the States as such, and . . . they are left to the State Governments for security and protection, and not by this article placed under the special care of the federal government.").

In *Baldwin*, this Court also noted that it has rejected an interpretation that the Privileges and Immunities Clause guarantees certain "natural rights" in every State. *Baldwin*, 436 U.S. at 381-382, 98 S.Ct. at 1859. Instead, the settled interpretation is that the Privileges and Immunities Clause guarantees that "in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens against other States in favor of its own." *Id.*; *quoting Hague v. CIO*, 307 U.S. 496, 511, 59 S.Ct. 954, 962, 83 L.Ed. 1423 (1939).

The *Baldwin* case also confirms that the Privileges and Immunities Clause is not concerned with recreational activities such as hunting or fishing, which are not among the "fundamental" rights or

activities protected by the Privileges and Immunities Clause:

> Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. Appellants do not – and cannot – contend that they are deprived of a means of a livelihood by the [licensing] system or of access to any part of the State to which they may seek to travel. We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a non-resident's participation therein without similarly interfering with a resident's participation. Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.

Baldwin, 436 U.S. at 388, 98 S.Ct. at 1863.

It is submitted that substitution of "fishing" for "elk hunting" and "Louisiana" for "Montana" provides sufficient reasoning for rejection of the Petitioners' claim for relief under the Privileges and Immunities Clause.

III. LOUISIANA LAW PROVIDES THAT THE OWNER OF FLOODED PRIVATE PROPERTY MAY EXCLUDE TRESPASSERS

The Fifth Circuit determined that under Louisiana law the Walker property is not burdened with a public servitude that would allow unrestricted access to the property for fishing, even while flooded by water from the Mississippi River. This holding is firmly rooted in established principles of Louisiana law. Petitioners have now apparently abandoned their arguments to the contrary in the courts below by failing to brief the issue to this Court.

Nevertheless, Respondent submits that the discussion by the Fifth Circuit and the authorities cited therein confirm that under Louisiana law property between the ordinary high and the ordinary low marks of a navigable river (the "bank") are "private things" subject to certain "public uses." La. C.C. art. 456.[12] "According to well-settled Louisiana jurisprudence, which continues to be relevant, the servitude of public use under this provision is not 'for the use of the public at large for all purposes' but merely for purposes that are 'incidental' to the navigable

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[12] Walker, the owner of the property at issue, has disputed whether the property may be classified as the "bank" of the River, and thus not subject to the limited bank servitude. As shown, accepting Petitioners' contention to the contrary as true, however, does not result in their being allowed access to the property. Therefore, the courts below did not decide the question of whether the Walker property was indeed the "bank" of the River.

character of the stream and its enjoyment as an avenue of commerce." *Id.*, comment (b) (citations omitted); *see also Buckskin Hunting Club v. Bayard,* 03-1428, 868 So.2d 266, 275-276 (La.App. 3rd Cir. 3/3/2004); *Walker Lands*, 871 So.2d at 1268, footnote 6. Recreational fishing on the banks of the Mississippi River is not a use incidental to navigation. *See Walker Lands*, 871 So.2d at 1268 n. 6 (citations omitted); *see also*, *State v. Barras,* 602 So.2d 301, 305 (La. App. 3rd Cir. 1992); *and Edmiston v. Wood,* 566 So.2d 673, 675-676 (La. App. 2nd Cir. 1990). The Petitioners' recreational activities are not protected by the Louisiana navigational servitude.

The Petitioners' "running waters" argument was also properly rejected by the Fifth Circuit below. Louisiana law provides that although "running water" from a navigable river is a public thing and a private landowner must allow the running waters to pass through his estate, Louisiana law "does not mandate that the landowner allow public access to the waterway." *Buckskin Hunting Club,* 868 So.2d at 274.

Louisiana law, therefore, does not support the Petitioners' claims for relief.

CONCLUSION

The decision below recognized that owners of private property that is occasionally flooded by backwaters of the Mississippi River may protect their property rights against recreational fishermen that intrude upon the private property during times of high water. The decision did not carve out any "recreational use exclusion" to the federal navigational rights. None of the constitutional provisions or laws cited by the Petitioners protect or even mention fishing on flooded private property. None directly addressed any fishing rights at all.

The Fifth Circuit's decision below does not affect federal navigation rights. The "navigation" contemplated and protected by federal law does not include recreational fishing. The use of the Mississippi River as a highway of commerce has nothing to do with Petitioners' claims and is untouched by the decision below.

In addition, the prohibition against unwanted trespass upon flooded private property recognized in the decisions below has no effect on the recreational use of navigable waterways of America. The private property at issue, even when flooded, has been determined to be non-navigable. That determination is unchallenged here. This case is not an attack on public access to navigable waters. This case is about a landowner's right to exclude trespassers who simply want to fish on legally non-navigable flooded private property. All of Petitioners' epic effusion directed at a

single Sheriff in rural Louisiana cannot change this simple fact.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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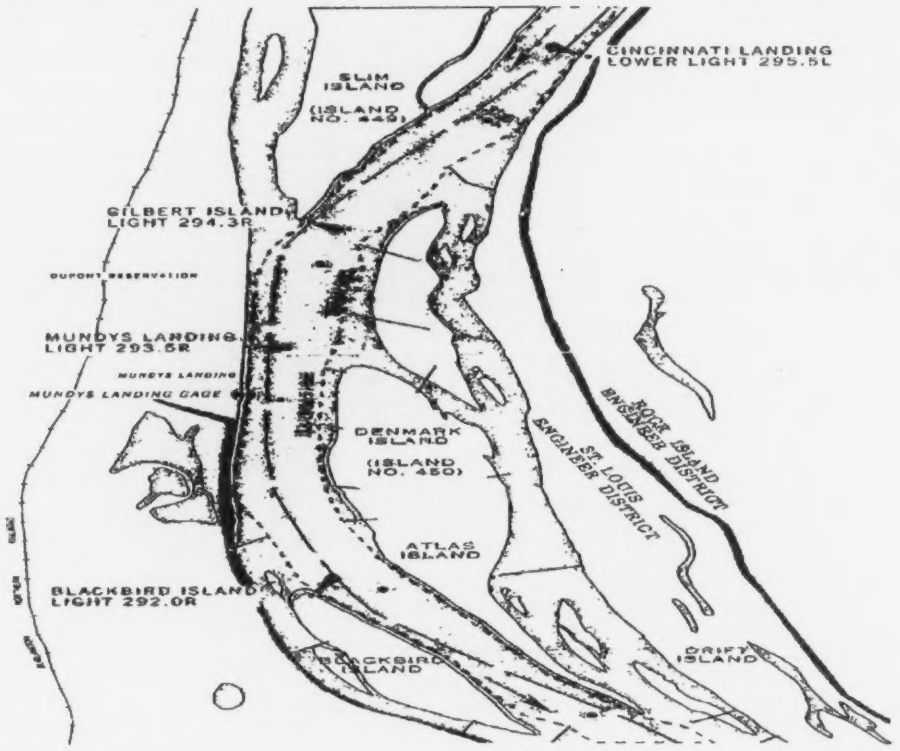
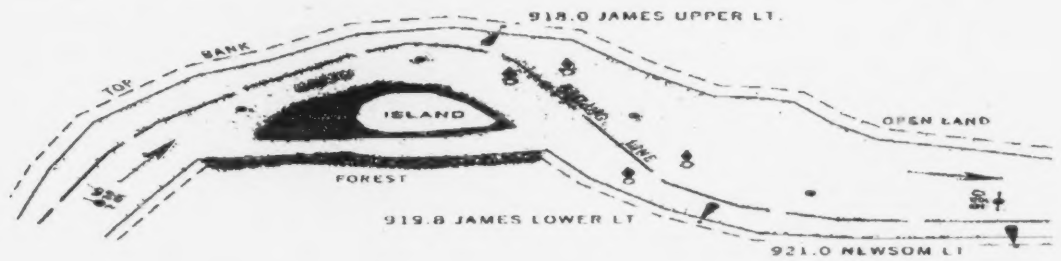
LEGEND

TYPICAL CROSSING CHANNEL ABOVE CAIRO, ILLINOIS



TYPICAL CROSSING CHANNEL BELOW CAIRO, ILLINOIS



Crossing channels marked by buoys during low water. Consult 'LOCAL NOTICE TO MARINERS' for detailed sailing directions.

See note in 'Notes Regarding Aids To Navigation' for more information. Navigation lights identified by river mile and name.

Waters Edge equals Low Water Reference Plane +5 (five) feet above Mile 320 AHP.
Waters Edge equals Low Water Reference Plane zero below Mile 320 AHP.

Daymarks may be identified as DBN.

The Color Magenta Is The 'Warning' Color For This Series of Maps.

SYMBOLS

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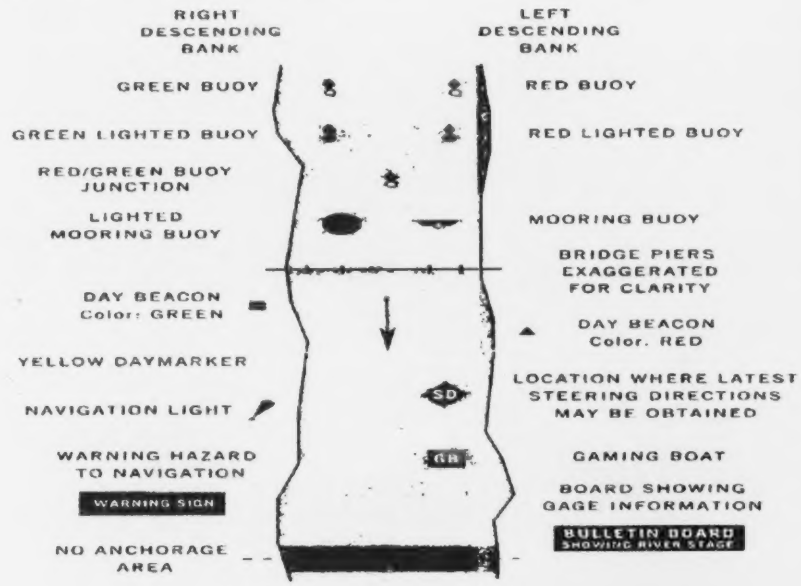

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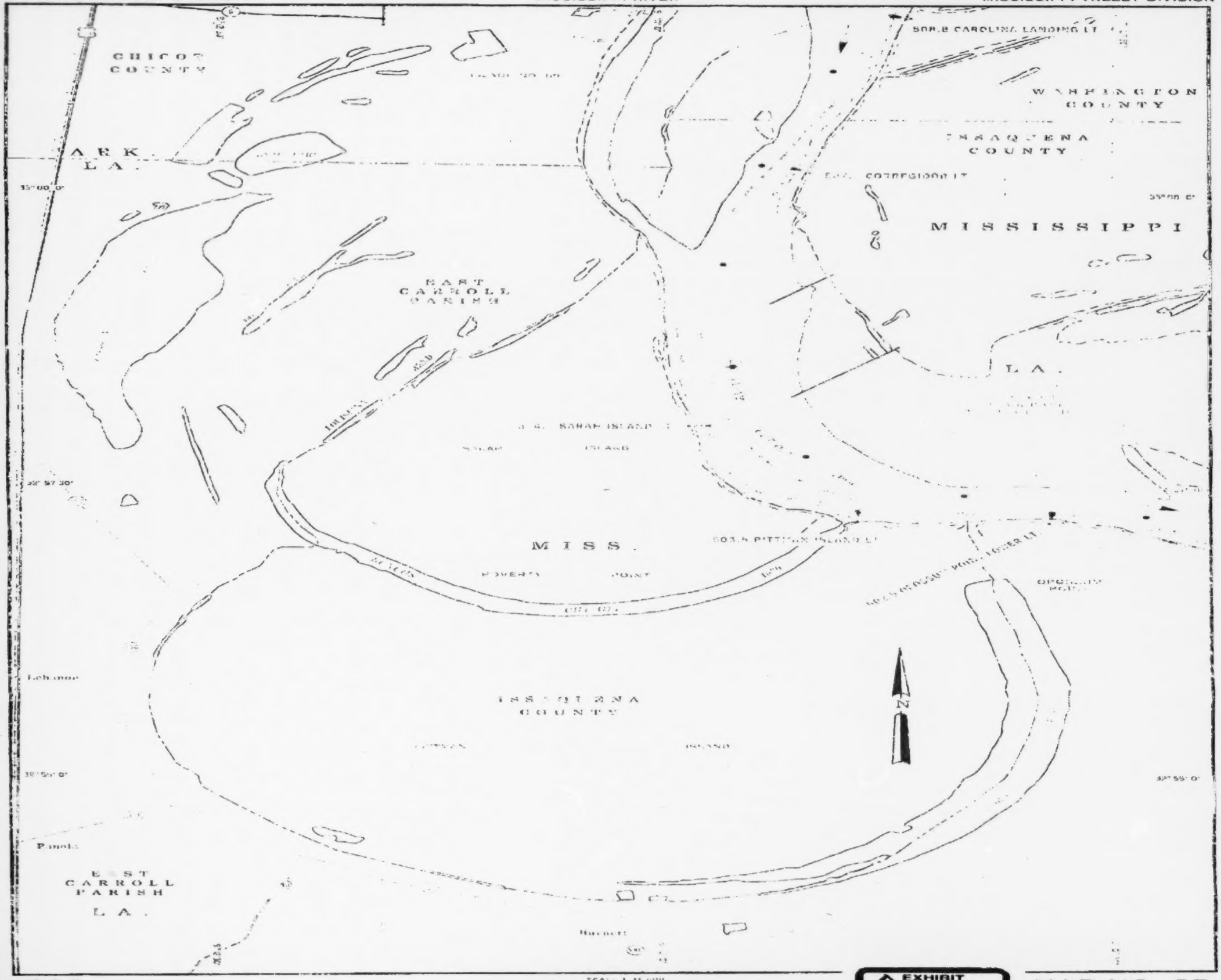

1998

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1 INCH = 2,583 FEET

EXHIBIT J

MAP NO. 85

App. 1

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(2)

No. 07-1289

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

NORMAL PARM, JR., et al.,

Petitioners,

v.

MARK SHUMATE, in his official capacity as Sheriff of East Carroll Parish, Louisiana,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICI CURIAE* OF A COALITION OF CONSERVATION, WILDLIFE, FISHING AND WETLANDS ORGANIZATIONS LED BY RESTORE OUR WATER ACCESS, INC., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Can the public's right to fish the navigable waters of the United States – as delimited by the mean high water mark and in view of seasonal or regular flooding – be restricted under the Privileges or Immunities Clause, the equal footing and federal navigational servitude doctrines, and federal common law?

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BRIEF *AMICI CURIAE* OF A COALITION OF CONSERVATION, WILDLIFE, FISHING AND WETLANDS ORGANIZATIONS LED BY RESTORE OUR WATER ACCESS, INC., IN SUPPORT OF PETITIONERS

Restore Our Water Access, Inc. (hereinafter "ROWA"), respectfully submits the following brief as *amici curiae* on behalf of a coalition of conservation, wildlife, fishing and wetlands organizations, in support of petitioners, Normal Parm, Jr. et al.[1]

INTEREST OF *AMICI CURIAE*

1. *Institutional Profiles of Selected* Amici.

a. *Restore Our Water Access, Inc.* ROWA,

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[1] Pursuant to S. Ct. R. 37.2(a), petitioners and respondent received timely notice of the intent to file this brief, and all parties have consented to the filing of the brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *Amici Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, or its counsel, made a monetary contribution to its preparation or submission.

A complete list of the members of the coalition of organizations supporting this filing appears in the Appendix to this brief.

organized in 2005, is a not-for-profit organization established to restore the rights of Louisiana citizens to access and lawfully use public waters. These rights predate statehood and have been enforced for decades, contributing to Louisiana's rich cultural history and outdoor heritage. More recently, however, laws and court rulings contrary to the constitutional and common law underpinnings of traditional public access rights have encroached upon and, in some cases, dramatically curtailed public access to public waters. ROWA's organizational members include the Louisiana Bass Federation Nation, the Fisheries Policy & Management Committee of the Louisiana Wildlife Federation, St. Bernard Sportsmen's League, East Ascension Sportsman's League, Louisiana Sportsman magazine, Waterways Access Association, and PAWRA, some of which are members of the coalition supporting this brief (see Appendix).

Thus far, working with other groups and the Louisiana Legislature, ROWA has succeeded in having the Louisiana State Land Office post its waterbottom ownership maps on the Internet. ROWA will be pursuing additional strategies to resolve public access questions and disputes in coastal waters.

b. *B.A.S.S. Federation Nation and The Bass Federation, Inc.* Although B.A.S.S. Federation Nation ESPN and The Bass Federation, Inc. are now distinct organizations, they share a common mission and purpose and a history dating back 35 years.

B.A.S.S. Federation Nation, with its state chapters (and overseas affiliates), in association with ESPN, has been a community united by a sense of

camaraderie and a spirit of belonging to something unique that carries from generation to generation: the love of sport-fishing and the protection of the natural environment for all Americans. B.A.S.S. Federation Nation sponsors state-wide qualifying tourneys, leading to divisional competition, and culminating in the premier events of bass fishing: the annual Federation Nation Championship, the Bassmaster Classic, and the Bass Club World Championship.

In addition to the sponsorship of exciting tournament fishing, B.A.S.S. Federation Nation has established conservation and youth program initiatives as areas critical to the viability of the sport and our national outdoors lifestyle. In recognition of its members' dedication to the preservation of the sport's natural resources, conservation features and initiatives include: (1) a Federation Nation Stewardship Program linked to National Fish Habitat Action Plan and the "More Fish" Initiative, providing a minimum of $1,000 annual endowment to each state Federation Nation for fish habitat work; and (2) establishment of the B.A.S.S. Federation Nation Conservation College Scholarship Program, offering a variety of four-year and two-year scholarships in undergraduate and graduate awards for students pursuing fisheries and biology studies.

The Bass Federation, Inc. (TBF), is the oldest and largest organized grassroots fishing, youth and conservation organization in the United States with over 1900 clubs, 30,000 members and 46 affiliated federations. TBF has formed a new "Partnership in Fishing" with FLW Outdoors, the largest marketer and promoter of fishing tournaments in the world. TBF

also has among its ranks a fishing program in 35 universities and colleges nationwide, a large youth club membership base and will soon fully launch the TBF National Youth Education program into the public school systems nationwide in the United States. The program will promote fishing, conservation and the outdoors experience.

In 2007, TBF and its affiliates conducted 20,000 fishing and conservation-related events in the U.S. Also in 2007, through its partnership with FLW Outdoors, and its sponsor partners, $52,000 was awarded in TBF state federation conservation grants, for projects such as public\boater access, erosion control, fish release boats, forage stockings, and habitat enhancement. These grants were generally matched 3:1 with federal funds for the individual projects.

c. *State Wildlife and Conservation Federations.* The state Wildlife and Conservation Federations represented here (from nearly ten states) are united in their mission to educate, inspire, and empower individuals and organizations to take action to conserve and to support the sustainable harvest and wise use of fish, game, wildlife, forest and other natural resources, to help protect our planet's environment, and to nourish an ethic of stewardship and enjoyment of our natural world. From hunters to bird-watchers, teachers to backpackers, gardeners to farmers, these state federations have established themselves as umbrella organizations representing various interests and are committed to building partnerships that help ensure that our children and grandchildren enjoy the same natural heritage and opportunities for outdoor

recreation.

Many of these state organizations have been operating continuously since the beginning of the conservation movement in the early twentieth century, and have been responsible for many state-based and national legal and policy initiatives for the promotion of best practices for hunting and angling, and the preservation of the natural environment (including those associated with navigable waters and wilderness areas). Depending on the size and population of the state represented, these wildlife and conservation membership organizations represent the interests of hundreds of thousands of individuals. Many of these state organizations are involved in research and publication efforts, the maintenance of charitable endowments for conservation purposes, and legal and policy action to ensure continued public access to water and wilderness areas.

2. *The Common Interests of this Extraordinary Coalition.* This broad array of institutional and individual *amici* represents every aspect of outdoor recreational constituencies: national, regional and local interests in the areas of conservation, wildlife management, sport and recreational fishing, and wetlands science. The *amici* coalition has broad experience with, and an interest in, the rational management of the nation's navigable waters, the conservation of the resources of those waters, and open access to the public for purposes of fishing, hunting, bird-watching, canoeing and kayaking, wildlife observation, and communing with nature.

The *amici* coalition represents virtually every

federal judicial Circuit, as well as reflecting the national interests associated with the uses of this country's navigable waters. They also come from every State bordering the Mississippi River, the rights to access of which are the subject of this petition. These organizations have, collectively, tens of thousands of members and reflect broad public constituencies. *Amici* coalition quite literally represent the public interest in public access to the navigable waters of this nation.

This petition concerns rights of the public – under federal and state law – to traverse navigable waters for purposes of recreational and sport fishing and related activities. *Amici* coalition will focus here exclusively on the federal law aspects of the public's right of access to the navigable waters of this country, particularly (1) the federal constitutional and common law aspects of rights to access to navigable waters, including the equal footing doctrine, the Privileges or Immunities Clause, see U.S. CONST. Amend. XIV, § 1, and related principles; (2) any relevant federal statutory authority bearing on rights of access; and (3) federal law characterizations of the activities at issue here (whether fishing can be assimilated to commerce) and the nature of property at question in this case (whether flood-lands assimilated to navigable waters have impressed upon them a public right of access).

It would be difficult to calculate the exact number of Americans who regularly engage in sports and recreational angling, who kayak and paddle on the nation's navigable waters, and those who hike, bird-watch or commune with nature in proximity to such waters, but such would have to be conservatively

estimated in the several millions of individuals. At issue in this petition is continued access to the navigable waters of the United States for these legitimate purposes and activities, particularly fishing. In response to efforts to "enclose" the national recreational "commons," this brief *amici curiae* is addressed.

ARGUMENT

THIS COURT'S REVIEW IS NECESSITATED BECAUSE THE DECISION BELOW ENCLOSES A LARGE PART OF THE WATERS OF THE UNITED STATES AND CONTRAVENES THE INTERESTS OF MILLIONS OF RECREATIONAL BOATERS AND ANGLERS

The nub of petitioners' claim is that they have a right of recreational and commercial use of the waters of the United States for fishing, when those waters are associated with otherwise navigable waterways and are situated below the mean high water mark, as determined by applicable legal standards. See Pet. App. 14. Private landowners underlying such waters have no right to exclude the public during the time they are in a normal flood stage, and, therefore, Respondent was not acting lawfully in arresting members of the public, including petitioners, for trespass. See id. As the court below recognized, the essential issue here is whether petitioners "have . . . a federal . . . right to fish on [waters overlying property] in the spring during the Mississippi River's normal flood stage." Id.

The Fifth Circuit, in the opinion for which review is sought here, concluded that any federal navigational servitude implicated in this case is strictly limited to commercial purposes, and "recreational" fishing is thus not a protected interest under federal law. See id. at 16 ("Neither navigation nor commerce encompasses recreational fishing." (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482-84 (1988)). This holding profoundly distorts the scope of the federal navigational servitude and its proper relationship with principles of state property law. The Fifth Circuit's holding also blithely ignores the relevance of a federal constitutional guarantee of access to the waters of the United States for recreational fishing, a right enshrined in the Privileges or Immunities Clause of the Fourteenth Amendment.

Taken together, the decision below creates an awesome change in public expectations of access to the waters of the United States for purposes of recreational fishing and other sporting and conservation activities. Access to waters that are in normal flood stage (as the properties at issue in this case unquestionably are) will cease, as landowners seek to enclose them, even though such waters are obviously accessed from navigable channels. Law enforcement entities will, as here, be suborned to exclude the public under threat of trespass. If left unreviewed, the Fifth Circuit's decision will galvanize the greatest enclosure initiative ever seen in relation to the waters of the United States. It will result in the diminution of the great fishing and recreational commons of this nation and the incalculable loss of areas of public access for fishing,

paddling, nature observation, and countless other activities.

I. The Fifth Circuit's decision is in irreconcilable conflict with those of state supreme courts and of this Court in regards to the scope of the public's right of recreational enjoyment of the waters of the United States.

Review of the Fifth Circuit's decision is necessitated because it results in an extraordinary dissonance between federal courts' construction of the scope of the federal navigational servitude and its application under the jurisprudence of many states in the nation. Additionally, the decision below is simply irreconcilable with the jurisprudence of this Court, which has given a broad ambit to the federal navigational servitude and certainly has never constricted it in relation to activities which can be regarded as recreational, especially sport fishing.

A. The Fifth Circuit's decision conflicts with that of the supreme courts of at least twelve states, all of which have recognized a right to fish and recreational use the waters of the United States.

While the court below properly recognized that the modalities of regulation of public trust lands are dictated by state property-law, see Pet. App. 17 (citing *Phillips Petroleum*, 484 U.S. at 482-84), and ostensibly disclaimed the need for "adopting a federal rule of decision in this context," Pet. App. 18, the panel's

opinion deliberately ignored the great weight of state property-law jurisprudence that has accepted that recreational fishing is a protected value and use of public trust lands. See Pet. App. 18 n.5 ("Plaintiffs point us to state court decisions that provide citizens with a right to fish on navigable waters. But those cases merely prove that states generally regulate the use of public trust lands."). With great respect to the court below, it is well settled – as a matter of state property-law – that included within the ambit of public trust lands and the federal navigational servitude is the right of the public to recreationally fish on waters below the federal normal high water mark. While other aspects of public trust rights may remain in doubt, see *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) ("there is no universal and uniform law upon the subject; but ... each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy"), this one is not.

The highest courts of Louisiana and Mississippi (the two states relevant to the Fifth Circuit's decision on the character of flood-lands for the Mississippi River), have conclusively held that rights of recreational boating and fishing (sometimes referred to in these cases as a right of piscary) are held by the public. See *State v. Barras*, 615 So.2d 285, 288 (La. 1993) ("The public has a traditional right to fish from boats in the navigable waters of the state."); *Ryals v. Pigott*, 580 So.2d 1140, 1152 (Miss. 1990) ("Those waters are navigable in fact which are navigable by loggers, fishermen and pleasure boaters.").

This proposition has been repeated in the

jurisprudence of many states, and precisely in the context raised here – public fishing and boating access to waters that are below mean high water. See, e.g., *Delinks v. McGowan*, 173 A.2d 488, 491 (Conn. 1961); *Thiesen v. Gulf, F. & A. Ry. Co.*, 78 So. 491 (Fla. 1917) ("The title to the soil under . . . [the] navigable waters, between high and low water mark is in the state of Florida subject to the powers of Congress to regulate commerce. The title to such land, however, is held by the state in trust for the people who have the rights of navigation, fishing, bathing, and commerce upon and in the waters."); *Butler v. Attorney General*, 80 N.E. 688, 689 (Mass. 1907) (all land titles "subject, however, as to that portion between high and low water mark, to the easement of the public for the purposes of navigation and free fishing and fowling"); *Glass v. Goeckel*, 703 N.W.2d 58, 64 (Mich. 2005) ("This rule – that the sovereign must sedulously guard the public's interest in the seas for navigation and fishing – passed from English courts to the American colonies, to the Northwest Territory, and, ultimately, to Michigan.") (citing *Shively v. Bowlby*, 152 U.S. at 11); *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 52 (N.J. 1972) ("The original purpose of the [public trust] doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principal transportation arteries of early days, and for fishing, an important source of food.") (citing and quoting *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892)); *Gwathmey v. State Through Dept. of Environment, Health, and Natural Resources Through Cobey*, 464 S.E.2d 674, 680 (N.C. 1995) ("all . . . waters,

whether sounds, rivers, or creeks, which can be navigated by sea vessels, are called navigable, in a technical sense, are altogether *publici juris*, and the soil under them cannot be entered and a grant taken for it under the entry law. In them, too, the right of fishing is free.")(citing *Collins v. Benbury*, 25 N.C. 277 (1842)); *Tiffany v. Oyster Bay*, 136 N.E. 224, 224 (N.Y. 1922) (the public has long enjoyed rights "general in their character, as yet not defined with accuracy beyond the ownership and regulation of oyster beds and some general aid to commerce, navigation, fishing or bathing"); *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & Rawle 71 (Pa. 1826); *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041 (R.I. 1995) ("The public-trust doctrine holds that the state holds title to all land below the high-water mark in a proprietary capacity for the benefit of the public. In benefiting the public, the doctrine preserves the public rights of fishery, commerce, and navigation in these waters."); *Caminiti v. Boyle*, 732 P.2d 989, 993 (Wash. 1987) (grants of land made "subject only to the paramount public right of navigation and the fishery.").

The decision below thus creates an insuperable conflict between a federal appeals court (the jurisdiction of which extends to the lower reaches of the Mississippi) articulating a narrow scope of the federal navigational servitude and precluding recreational boating and fishing activities, and a large number of state supreme courts that have decided that angling is just such a protected interest in public trust waters. Ultimately, of course, the scope and nature of the federal navigational servitude and public trust doctrine

is a matter of federal law. It is incumbent on this Court to ensure a consistency of application, especially in defining the extent of the servitude and trust. Left unreviewed, the Fifth Circuit's decision will result in untold confusion among lower courts required to choose between a narrowing construction of the public's right to access to waters (as in the decision below) and more expansive, historically consistent, and doctrinally faithful applications of such rights by state courts.

B. The opinion below also conflicts with the rulings of this Court establishing the equal footing doctrine for waters and recognizing the public's rights to fish up to normal high water.

1. The Fifth Circuit's decision also subverts a venerable tenet of American jurisprudence for public lands, one inherited from English common law and constitutional rights: the sovereign (whether the King, or the state) cannot convey title in lands in such a way as to derogate the public's rights and interests. In this case, the right of recreational boating and fishing has been long-recognized by this Court.

In *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842), the Court, Chief Justice Taney writing, observed:

> [Can the King] grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shell-fish or floating fish, within the limits of his

> grant[?] [T]he question must be regarded as settled in England, against the right of the king, since Magna Charta, to make such a grant.
>
> The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown, for the benefit and advantage of the whole community. Grants of that description are, therefore, construed strictly; and it will not be presumed, that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it.

Id. at 410-11 (citing *Blundell v. Catterall*, 106 Eng. Rep. 1190, 5 Barn. & Ald. 268, 287-309 (K.B. 1821); *The Duke of Somerset v. Fogwell*, 108 Eng. Rep. 325, 5 Barn. & Cres. 875, 883 (K.B. 1826)). See also *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855) ("The State holds the propriety of this soil for the conservation of the public rights of fishery thereon. . . ."); *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892) ("title [is] held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of

private parties.").

Since the time of *Martin*, it has been beyond cavil that "the public and common right of fishing in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders," 41 U.S. at 414, is not to be lightly presumed to have been arrogated. These foundational principles, derived from English common and constitutional law, also undergird this Court's fashioning of the "equal footing" doctrine, under which all States admitted to the Union, receive a statutory grant of public trust lands, especially to the surface and beds of navigable waters. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203-04 (1999) ("the 'equal footing doctrine' [is] the constitutional principle that all States are admitted to the Union with the same attributes of sovereignty . . . as the original 13 States.") (citing *Coyle v. Smith*, 221 U.S. 559 (1911)); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) ("The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests.").

By narrowing the federal navigational servitude, and the attendant public trust doctrine, to only those waters capable of commerce – and thus precluding recreational boating and fishing from the scope of trust lands – the Fifth Circuit's decision places the entire structure of this area of law at risk of substantial incoherence. The federal navigational servitude, under the Fifth Circuit's analysis, would no longer be

connected with sensible standards for navigability. See *Kaiser-Aetna v. United States*, 444 U.S. 164, 171-75 (1979).[2]

2. The decision below also profoundly misapprehends the proper role of federal law in establishing the contours of navigational servitudes and public trust lands, in conjunction with relevant state property-law principles. Dismissive of a "purported federal common law" on this subject, Pet. App. 18 n.5, and disavowing "a federal rule of decision in this context," id. at 18, the Fifth Circuit's decision nevertheless manages to surreptitiously impose a federal rule – but the incorrect one in regard to defining the scope of navigability in relation to pleasure craft, and the wrong technical standard in defining the mean high water (MHW) mark on the navigable waters of the United States as precluding regular seasonal flooding.

While the Fifth Circuit acknowledged, Pet. App. 15, the relevant statutory and regulatory language – the federal navigational servitude extends "laterally to

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[2] Although it is an analytically distinct question, this Court has indicated that in an assessment of navigability for purposes of invoking federal admiralty jurisdiction, U.S. CONST. art. III, § 2, cl. 1, the fact that the vessels and activities implicated were recreational in character does not preclude a finding of navigability and of invoking federal jurisdiction. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 670 n.2, 673 (1982) (allowing federal jurisdiction for incident involving "an 18-foot pleasure boat and a 16-foot recreational fishing boat," on a "river [location that was seldom], if ever, used for commercial traffic.").

the entire water surface and bed of a navigable waterway, which includes all the land and waters below the ordinary high water mark;" 33 C.F.R. § 329.11(a) – it inexplicably appeared to ignore that the waters at issue in this case indeed qualified. See Pet. App. 15 (noting that Louisiana defines "ordinary high water" to include 10-year seasonal flood areas). So far from extolling virtues of federalism, the Fifth Circuit actually substitutes its judgment for that of the Louisiana Supreme Court, see *DeSambourg v. Bd. of Comm'rs Grand Prairie Levee Dist.*, 621 So.2d 602, 612 (La. 1993), in defining the spatial scope of the navigational servitude and public trust lands in this case. See 33 C.F.R. § 329.3 (the precise definitions of "navigable waters of the United States" are dependent on judicial interpretation).

Indeed, there appears to be substantial confusion among federal appeals courts as to whether the navigational servitude burdens lands that are regularly submerged at flood stage. Language in this Court's decision in *Oklahoma v. Texas*, 260 U.S. 606 (1923), is suggestive that areas "overflowed in *exceptional instances* when the river is at flood," id. at 632 (emphasis added), are not within the servitude, although river beds that are subject to regular, seasonal flooding are. See id. ("When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course."). Indeed, the current regulatory articulation of the spatial extent of the federal navigational servitude has eliminated any exclusion for lands subject to regular or seasonal

flooding, a fact that has been noted by other courts of appeals. See *United States v. Harrell*, 926 F.2d 1036, 1041 & n.19 (11th Cir. 1991) (citing the earlier version of the regulation, 33 C.F.R. § 209.260(j)(i) (1977)).

While all of this seems like an arcane debate, one more worthy of being featured in a case subject to this Court's original jurisdiction, it should be remembered that this Court has traditionally exercised its wise discretion in granting review for cases that implicate the extent and scope of the federal navigational servitude and similar questions in delimiting the "ordinary high water mark," no matter how "technical" in nature. See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977); *Hughes v. State of Washington*, 389 U.S. 290 (1967); *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).

At stake here is not only a significant determination as to the spatial extent of the federal navigational servitude and state public trust lands, but also an even weightier issue of the interplay of state property-law in federal servitude/trust questions. This Court made clear in *Corvallis Sand* that state property-law was normally to be respected, but only insofar as pre-existing federal rights were preserved. See 429 U.S. at 379-80. In the decision below, the Fifth Circuit managed to turn this rule of construction on its head: state property-law rules (concerning the delimitation of the ordinary high water mark in relation to seasonal flooding) were ignored, even while the public's rights of access were derogated.

II. This case offers a superior vehicle for the Court's examination of the modern relevance of the Privileges or Immunities Clause of the Fourteenth Amendment in the context of such established rights of national citizenship as fishing on the waters of the United States.

Briefed below, see Appellant's Orig. Br. 29-31; Appellant's Reply Br. 12-14, but left unaddressed by the Fifth Circuit, is the question of whether a right of access by the public to the waters of the United States is a right of national citizenship guaranteed by the Privileges or Immunities Clause of the Fourteenth Amendment. See U.S. CONST. Amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

This Court has consistently accepted that the Fourteenth Amendment's Privileges or Immunities Clause continues to have modern relevance, despite the narrowing construction given to that provision by the majority opinion of this Court in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). In one recent case, this Court confirmed that aspects of the right to travel are guaranteed under the Clause, insofar as "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bonâ fide residence therein, with the same rights as other citizens of that State." Id. at 80. See *Saenz v. Roe*, 526 U.S. 489, 503-04 (1999). Likewise, it has been noted that rights of federal citizenship are protected under the Clause and "[l]ater cases only reinforced the idea

that there are such incidents of national citizenship." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 843-44 (1995) (Kennedy, J., concurring) (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *United States v. Classic*, 313 U.S. 299 (1941); *United States v. Guest*, 383 U.S. 745 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969)). "That federal rights flow to the people of the United States by virtue of national citizenship is beyond dispute." Id. at 844.

The *Slaughter-House* decision expressly indicates that access to the waters of the United States is just such a right of national citizenship. See 83 U.S. (16 Wall.) at 79-80 ("The right to use the navigable waters of the United States, however they may penetrate the territory of the several States. . .are dependent upon citizenship of the United States, and not citizenship of a State."). And while this Court has held that access to state game licenses by out-of-state residents is not a right guaranteed by the Privileges or Immunities Clause, see *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 388 (1978), the majority was careful not to extend this ruling to fishing on the navigable waters of the United States. See id. at 373 & n.5; 393 (Burger, C.J. concurring) ("nor may [a state] allocate access to its wildlife in a manner that offends the Fourteenth Amendment.") (citing *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948)). In an earlier decision, *Toomer v. Witsell*, 334 U.S. 385 (1948), this Court struck down a South Carolina statute requiring non-residents to pay license fees for shrimping 100 times as great as residents. See id. at 398-99.

The Fifth Circuit's decision is thus in implicit tension with those of other federal courts of appeals that have sustained section 1983 actions against state officials purporting to enforce state laws (including, presumably, trespass actions) against individuals exercising their rights to fish as guaranteed under the Fourteenth Amendment's Privileges or Immunities Clause. See *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84 (2d Cir. 2003). These cases have indicated that beyond the idea that fishing on the navigable waters of the United States is an incident of national citizenship, the Privileges or Immunities Clause is intended to promote those rights that are "sufficiently basic to the livelihood of the Nation" and that "bear[ ] upon the vitality of the Nation as a single entity." *Baldwin*, 436 U.S. at 383, 388; see also *Toomer*, 334 U.S. at 395-96.

While *amici* carry no brief for those who would repatriate the "Constitution in Exile," and who would wholesale resurrect the Fourteenth Amendment's Privileges or Immunities Clause as a new bulwark of liberty, this case does present an opportunity for the Court to examine one particular aspect of rights of national citizenship. That this would be in a context recognized even by the *Slaughter-House* Court – "the right to use the navigable waters of the United States, however they may penetrate the territory of the several States;" 83 U.S. (16 Wall.) at 79-80 – makes this a particularly attractive vehicle for analysis and decision. More importantly, the question of whether public access for boating and fishing on navigable waters are such rights of national citizenship within the ambit of

the Privileges or Immunities Clause is inextricably linked with the other issues raised here.

III. The Fifth Circuit's ruling that recreational fishing and boating is not "commerce" and is not a protected use of the nation's waters, endangers the interests of millions of American boaters and anglers.

As noted above, the crucial error made in the decision below was its characterization that "Neither navigation nor commerce encompasses recreational fishing. Accordingly, the navigational servitude does not create a right to fish on private riparian land." Pet. App. 16-17 (citations omitted). Without unnecessarily broaching the merits, it is already apparent that this ruling is against the great weight of authority, not only of this Court but also of state supreme courts.

By equating the federal navigational servitude and public trust lands with strictly "commercial" values, the Fifth Circuit runs counter to the express holding of this Court in *Phillips Petroleum* "reject[ing] the dissent's assertion that 'the fundamental purpose of the public trust is to protect commerce'." 484 U.S. at 476 n.5 (quoting id. at 801) (citing *McCready v. Virginia*, 94 U.S. (4 Otto) 391, 395-97 (1877), for the proposition that "[b]ecause of the State's ownership of tidelands, restrictions on the planting and harvesting of oysters there have been upheld.").

But even if a commerce yard-stick is applied to the activity of sport-fishing on the waters in question here, it would likely be satisfied – had that analysis

been engaged in by the lower courts here. As discussed, supra, recreational boating and fishing accounts is an activity engaged in by between 35 to 45 million citizens annually. Revenues from boat, tackle, bait, and accessory sales and rentals, tourist accommodations (lodging and meals), marina and dockage fees, and other provision of amenities exceed $40 billion annually and contributed over $100 billion to the national economy.[3]

But, far more significantly, if the decision below is left unreviewed it will result in waters that have been typically open to appropriate public recreational access – during regular or seasonal flood stages, at predictable times of the year, and through otherwise navigable channels[4] – to be enclosed through fear of private land-owner trespass actions. More pertinently,

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[3] See Outdoor Industry Foundation, *The Active Outdoor Recreational Economy* (Fall 2006), available at http://www.outdoorindustry.org/images/researchfiles/RecEconomy_State%20final403.pdf?52 (visited May 14, 2008); U.S. Census Bureau & U.S. Fish & Wildlife Service, *National Survey of Fishing, Hunting, and Wildlife - Associated Recreation* (2006), available at http://www.census.gov/prod/2008pubs/fhw06-nat.pdf (visited May 14, 2008).

[4] Under no circumstances would *amici* be suggesting that a private land-owner must suffer a recreational easement across their dry property. That was never an issue in this case. See Pet. App. 3. When viewed in this fashion, any argument that this case actually involves a significant private property interest is purely illusory.

the problematic aspects of the decision below – as to the delimitation of mean high water in areas subject to regular flood, with regard the interplay of federal servitude/trust law and state property-law, and in relation to the significant constitutional interests of citizens in fishing and boating on the waters of this country – will result in substantial confusion for courts, not only on the lower reaches of the Mississippi River but in other regions of the nation. At stake in this case is nothing less than the continued public access and vitality for the great American water and fishing commonage.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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NORMAL PARM, JR., et al.,

Petitioners,

versus

MARK W. SHUMATE, IN HIS OFFICIAL CAPACITY AS SHERIFF OF EAST CARROLL PARISH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* EDWARD WISNER DONATION IN SUPPORT OF RESPONDENT AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Edward Wisner Donation, is a trust owning several thousand acres of land in south Louisiana for the benefit of the City of New Orleans, Charity Hospital, the Salvation Army, Tulane University and certain heirs of Edward Wisner ("Wisner"). Wisner submits this *amicus curiae* brief: 1 – pursuant to the consent of Petitioners and Respondent; 2 – in support of Respondent, Mark W. Shumate, in his official capacity as the Sheriff of East Carroll Parish; 3 – in support of the decision rendered by the United States Fifth Circuit Court of Appeal; and 4 – in opposition to the Petition for Writ of Certiorari and the unprecedented assault on the rights of landowners presented therein.

This *amicus curiae* brief addresses selected issues raised by Petitioners in their Petition for Writ of Certiorari. The issues briefed herein are of great interest and significant importance to Wisner and all landowners throughout the State of Louisiana. If

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[1] Pursuant to Rule 37(6) of the Rules of this Honorable Court, *amicus curiae* Wisner represents that no counsel for any party to this matter authored this *amicus curiae* brief in whole or in part. No party, no party's counsel and no person other than *amicus curiae*, its members or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Rule 37(2)(a), *amicus curiae* Wisner represents that counsel of record for all parties timely received notice of *amicus curiae*'s intent to file this brief. Consent to the filing of this *amicus curiae* brief was granted by counsel for all parties.

Petitioners are able to convince this Honorable Court to grant their Petition and ultimately overturn the decision of the United States Fifth Circuit Court of Appeal, the owners of private property in the State of Louisiana stand to lose their constitutional rights to use and enjoy their property without interference from others. A reversal of the Fifth Circuit's decision would create confusion in the realm of Louisiana property law and potentially could have a substantial impact on the rights of property owners throughout the United States.

SUMMARY OF ARGUMENT

Petitioners have framed the question presented to this Honorable Court in a manner that misrepresents the holding of the Circuit Court. The Fifth Circuit did *not* hold, as Petitioners claim, that "the public has no federally created right, nor any federally protected right to travel on or use *any* of the navigable waters of America for recreational purposes." Petition for Writ of Certiorari ("Pet. for Writ"), p. 9. Nor did the Fifth Circuit create a "new Recreational Use Exclusion" to the public's right to recreate on "the navigable waters of America." Pet. for Writ, p. 1. Rather, the Fifth Circuit identified the key issue before it in terms of whether the public has a right to fish on private property, which is covered during the spring by flood waters of the Mississippi River. *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007). The court held that neither federal nor state law grants

Petitioners and/or the public in general that right. Accordingly, it affirmed the decision of the district court. *Id.* at 137.

At no stage of these proceedings have Petitioners addressed the fact that the underlying pre-requisite of their arguments simply does not exist. Their arguments rest on the incorrect and unproven assumption that the "waters" to which they claim a right of use and which are located on privately owned property are "navigable." The law and the facts establish that they are not. As this Court has repeatedly held, navigability as a matter of law means "navigable-in-fact" and susceptible to use for regular commerce.[2] *See, e.g., The Daniel Ball,* 77 U.S. 557, 1870 WL 12737 (1870). As discussed more fully below, Gassoway Lake and the other "waters" involved in this litigation simply do not meet the test for navigability. Under well-settled principles set forth in numerous decisions rendered by this Honorable Court and relied upon by the Fifth Circuit in reaching its decision, the alternative tests and authorities advanced by Petitioners are inapplicable and erroneous as a matter of law. *Parish*, 513 F.3d at 143-44.

In sum, neither Petitioners nor the public has any right to access or use the non-navigable waters

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[2] The definition of "navigable waters" is at the core of the issues before this Honorable Court. Nevertheless, in their Petition for Writ of Certiorari, Petitioners ignore the dispositive case law, including highly relevant decisions of this Court, on the issue of navigability.

located on the private property at issue, even when the property is temporarily covered by floodwaters. Because a reversal of the Fifth Circuit's decision denying Petitioners the extraordinary right they claim will have an adverse impact on the private property rights of Wisner and riparian landowners throughout the State of Louisiana, it is imperative that this Court affirm the decision of the Fifth Circuit and deny the Petition for Writ of Certiorari.

ARGUMENT

A. Petitioners Have Not Established that the Waters to Which They Seek Access Are Navigable.

The most glaring error in the position taken by Petitioners in the lower courts and here is their underlying and erroneous assumption that the waters that occasionally flood and temporarily cover the private property owned by *amicus curiae* Walker Cottonwood Farms, L.L.C. ("Walker") are, in fact, "navigable." Petitioners acknowledge that every rule or theory of law pursuant to which they seek relief from this Court, including cases under the Privileges and Immunities Clause, the Equal Footing Doctrine, federal common law and the federal navigational servitude, all require the presence of "navigable waters." Notwithstanding the great weight of authority requiring that waters to which the public has a right of access and use must be navigable, Petitioners ignore the fact that all of their arguments fail if the

waters to which they claim a public right of access and use – including Gassoway Lake, the drainage ditch and other "water bodies" on Walker's property – are not navigable-in-fact.

As pointed out by the Fifth Circuit, the Louisiana Second Circuit Court of Appeal in a related case found that under applicable Louisiana law, the "waters" at issue are not navigable-in-fact and, therefore, are *not* navigable water bodies to which the federal or any state navigational servitude applies. *Parm*, 513 F.3d at 140 [citing *Walker Lands, Inc. v. East Carroll Parish Police Jury*, 871 So.2d 1258, 1265-66 (La. App. 2 Cir. 2004), *writ den.*, 903 So.2d 442 (La. 2005)]. As shown below, this Honorable Court should apply its own long-standing decisions and reach the same conclusion as the Louisiana Second Circuit and the United States Fifth Circuit in order to secure the constitutionally and statutorily protected rights of landowners in the State of Louisiana.

1. This Court Has Articulated the Definitive, Dispositive Test for "Navigability" and Petitioners Cannot Meet It.

This Court has often stated the test for "navigability," though the elements of the test vary depending on its context.[3] Petitioners argue, *inter alia*, that

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[3] In *Kaiser Aetna v. United States*, 444 U.S. 164, 171-72, 100 S.Ct. 383, 388-89 (1979), this Court acknowledged that the

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their "right" to fish on privately owned waters derives from both "a federal common law right of navigation" and the federal navigational servitude. Their arguments rest on the erroneous assumption that the floodwaters which sometimes cover the Walker property for a very limited period of time are part and parcel of the indisputably navigable waters of the Mississippi River. Petitioners ignore and/or tortuously attempt to distinguish a considerable body of federal and state law that differentiates a navigable waterway from floodwaters which occasionally emanate from that waterway and inundate land adjacent to – or, in this case, land located miles from – a navigable waterway. For the reasons and under the authorities set forth below, particularly the pronouncements of this Court, Wisner respectfully submits that the arguments of Petitioners should be rejected as being contrary to well-settled law, and the decision of the Fifth Circuit dismissing their claims should be affirmed.

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concept of navigability arises in cases involving: (1) the boundaries of the federal navigational servitude; (2) the scope of Congress' regulatory authority under the Commerce Clause of the Constitution; (3) the regulatory authority of the U.S. Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.A. § 403, *et seq.*; and (4) the jurisdictional limits of the federal courts in admiralty/maritime cases under Article III, Section 2 of the Constitution.

2. Commercial Use and/or the Susceptibility Therefor Is the Most Critical Element of the Applicable Test for "Navigability".

In *The Daniel Ball*, 77 U.S. 557, 1870 WL 12737 (1870), this Court established the traditional test for navigability on which the public's right of access and use claimed by Petitioners depends.[4] *The Daniel Ball* test has been applied to determine "navigability" in the context of the federal navigational servitude, Congress' power under the Commerce Clause and the Corps of Engineers' regulatory authority. In that seminal case this Court held:

> A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are *used, or are susceptible of being used, in their ordinary condition, as highways for commerce,* over which trade and travel are or may be conducted *in the customary modes of trade and travel on water.*

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[4] The foundation for Petitioners' claim of the right to fish upon Walker's property when parts of it are temporarily covered with water – i.e., that the "waters" are navigable – was not established through competent evidence by Petitioners in the district court. Moreover, in their Petition to this Court, Petitioners merely assert in a conclusory fashion with no legal support or factual evidence that "recreational navigation in today's America is as 'commercial' as towing a barge. . . . " Pet. for Writ, p. 20.

> And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their *ordinary condition* by themselves, or by uniting with other waters, *a continued highway over which commerce is or may be carried on* with other States or foreign countries in the customary modes in which such commerce is conducted by water. [Emphasis supplied].

The Daniel Ball, 77 U.S. at 563. This definitive and determinative test for "navigability" articulated by this Court more than one hundred years ago mandates a finding that the lands/waters to which the Petitioners claim a right of access and use are simply not navigable.

As stated above, Petitioners' claims rest on their erroneous and unfounded assumption that overflow waters of the Mississippi River, which seasonally flood Walker's land, are navigable-in-fact. Their contention, however, fails to take into account this Court's pronouncement that in order to be "navigable-in-fact," the waters in question must be being used, must have been used, or must be susceptible to use for "commerce." *Id.* As the record before the Court confirms, Petitioners submitted no evidence in the lower court proceedings to establish that the lands/waters over which they claim the right to navigate and fish are currently being used, have ever been used or are otherwise susceptible to being used for navigational "commerce."

This Court has defined "commerce" as "an exchange of commodities." *Id.* at 561. While some lower courts have expanded the definition of "commerce" in cases involving issues of navigability and the public's right of access to certain waters, the relevant jurisprudence limits the term to this Court's definition in *The Daniel Ball* and/or to the common and ordinary meaning of the word.[5]

Petitioners argue that the Fifth Circuit's holding in this case is "in direct conflict with [its] prior holding in *Silver Springs Paradise Company v. Ray*, 50 F.2d 356 (5th Cir. 1931). Pet. for Writ, p. 29. They contend that *Silver Springs* recognized a "federal common law right of navigation," which encompasses not just commerce but recreational use. *Id.* Petitioners are simply wrong. The Fifth Circuit neither recognized nor even mentioned a "federal common law right of navigation" in *Silver Springs*. Moreover, *Silver Springs* is distinguishable from this case because it involved a claim by riparian landowners to ownership of land located beneath waters that actually *did* meet *The Daniel Ball* "commerce" test for

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[5] "Commerce" is defined as "the exchange or buying and selling of commodities on a large scale involving transportation from place to place." Merriam Webster's Collegiate Dictionary, 10th Edition. "Commodity," a term used both by Webster's Dictionary and this Court in defining the term "commerce," is defined as "an economic good as a product of agriculture or mining; [and/or] an article of commerce especially when delivered for shipment." Merriam Webster's Collegiate Dictionary, 10th Edition.

navigability. In contrast, this matter involves a claim that Petitioners and the public have a right to access and use "waters" that are *not* navigable because they only occasionally and temporarily cover lands which, in their ordinary and natural condition, are dry and inaccessible by boat.

Petitioners also ignore the fact that the Fifth Circuit in *Silver Springs* drew a distinction between a riparian landowner's limited right to exclude the public from that portion of his submerged lands "bordering on public navigable waters" – which describes the lands in dispute in *Silver Springs* – and the landowner's "full and complete" title to land which is not directly connected to the navigable water – which describes the lands/waters located on Walker's property. *Silver Springs*, 50 F.2d at 358. In its brief to this Court, *amicus curiae* Walker explains that Petitioners and other trespassers are able to gain access to Gassoway Lake and/or the other "waters" at issue only by launching their boats into Bunch's Cutoff and then making their way through a man-made drainage ditch to the lakes, including Gassoway Lake, located on Walker's property. *See* Brief of *Amicus Curiae* Walker Cottonwood Farms, L.L.C., pp. 1-3 and nn. 1 and 2. Petitioners do not – as they try to make it appear – gain access to Gassoway Lake by launching their boats on the Mississippi River and then floating across the three and one-half miles of forest and crop lands that lie between the Mississippi and the lake. *Id.*

Moreover, in *Walker Lands*, the Louisiana Second Circuit Court of Appeal upheld the factual findings of the trial court in that related matter regarding Walker's property and the drainage ditch, which findings included:

> [T]he outlet/drainage ditch is in fact a drainage ditch of Gassoway Lake that has been altered by man and is not a navigable stream as perceived by the [Louisiana] Civil Code.
>
> [The ditch] makes a ninety degree angle at one point, due to materials placed by man. . . .
>
> During many times of the year, the ditch has insufficient water for the smallest boats to travel from Bunch's Cutoff up through the ditch into Gassoway Lake.
>
> [T]he amount of vegetation in the ditch prohibits traversal of this area during certain times of the year and even during high water, one would have to leave the banks of the ditch and cross private land and run along beside the ditch to gain access to Gassoway Lake.

Id.

Thus, unlike the land and waters at issue in *Silver Springs*, Gassoway Lake, the drainage ditch and other parts of Walker's property to which Petitioners claim a right of access and use have "no direct connection" with the navigable Mississippi

River and, therefore, are *not* themselves navigable. *Silver Springs*, 50 F.2d at 358.

In sum, the waters to which the public claimed a right of access in *Silver Springs* were clearly "navigable" under the applicable navigational "commerce" test. *The Daniel Ball, supra.* That is, the waters of Silver Springs had been previously and/or were currently being used as a continuing highway of interstate commerce – i.e., for commercial, navigational purposes. Again, the arguments of Petitioners in this case must fail because they entirely disregard the issue of and test for "navigability" – a critical element which they must establish in order for their public access/use claim to succeed.

Also instructive is the Fifth Circuit's recent decision in *In re: Needham*, 354 F.3d 340 (5th Cir. 2003), a case arising under the Oil Pollution Act of 1990, 33 U.S.C.A. § 2701, *et seq.* The question presented was whether the waterway at issue – the "Company Canal" – was navigable-in-fact.[6] The Company Canal was "an industrial corridor between the Intracoastal Waterway and Bayou LaFourche," which contained shipyards, repair facilities, drydocks and other commercial enterprises. *Id.* at 347. Applying

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[6] Although *In re. Needham* is distinguishable from the case before this Court because it involved the question of whether an oil spill in the waterway was subject to federal regulation, the test applied by the court in *Needham* as to navigability – *The Daniel Ball* test of navigational commerce – is the same test applicable in this case. *Needham*, 354 F.3d at 346-47.

The Daniel Ball test for navigability, the court held that even though it was an inland waterway, the Company Canal was "navigable-in-fact" because it "supports *commerce*, is unobstructed, and is traversed on a consistent basis." *Id.* [Emphasis supplied]. Since the oil spilled into Bayou Folse, which was "adjacent" to the Company Canal, "an open body of navigable water," the spill was covered by the statute. *Id.*

Applying the same criteria utilized in *Needham* to this case, it is clear that the waters located on the Walker property to which Petitioners seek a right of use do not meet the test for navigability. Accordingly, there is no public right of access to those properties whether they are dry, which is their natural, ordinary condition, or temporarily covered by floodwaters that have meandered across the dry land from the Mississippi River, three and one-half miles away.

In a case involving recreational use of a waterway, *Lykes Bros. Inc. v. U.S. Army Corps of Engineers*, 821 F.Supp. 1457 (M.D. Fla. 1993), *aff'd.*, 64 F.3d 630 (11th Cir. 1995), Petitioners sued the Corps of Engineers challenging its finding that Fisheating Creek was in part a navigable water of the United States and, therefore, subject to the Corps' regulatory authority under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.A. § 403, *et seq.*[7] In setting aside

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[7] Although *Lykes Bros.* is distinguishable from the case before this Court, it did involve the issue of what constitutes "navigability" under *The Daniel Ball* test and held, as should this Court in this matter, that recreational uses of a land-locked

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the Corps' determination of navigability, the court in *Lykes Bros.* also relied on and applied this Court's test for navigability as set forth in *The Daniel Ball*. *Lykes Bros.*, 821 F.Supp. at 1462-63. The court held in pertinent part as follows:

> (1) Fisheating Creek is not a navigable waterway because it "has not been used and has not be [sic] susceptible for use to transport interstate *commerce*". . . . *Id.* at 1463;
>
> (2) "To be considered susceptible for commercial navigation, the waterway *in its ordinary and natural condition* must have a sufficiently well-defined, passable channel, and the water levels must be able to sustain *commercial navigation on a predictable and reliable basis*. . . . One cannot reliably predict weather and accordingly the amount of rain in the FEC basin." *Id.*;
>
> (3) "*Evidence of navigation during periods of flooding or abnormally high water is not sufficient to support a finding of navigability.*" *Id.*;
>
> (4) An "adventure trip for recreational purposes . . . does not support a conclusion that Fisheating Creek has been used or

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waterway, such as the "waters" at issue here, do *not* constitute "commerce" for purposes of determining navigability. *Lykes Bros.*, 821 F.Supp. at 1464.

is susceptible of being used for commercial navigation." *Id.* at 1464;

(5) "*The recreational activities of these non-commercial fishing excursions . . . do not render FEC susceptible of being used as an artery of commerce.*" *Id.*; and

(6) "*A land-locked waterway with no direct navigable link to interstate or foreign waterways cannot be considered a 'navigable waterway of the United States'* under the *Daniel Ball* test." *Id.* at 1465.

[Emphasis supplied and citations omitted]. *Id.* at 1463-65.

Similarly, in this case, there is no evidence that Gassoway Lake or the other "waters" on Walker's land have ever been used for navigational "commerce" in the legal, ordinary or common-sense meanings of the word. *Walker Lands,* 871 So.2d at 1266. The waters that occasionally spill over the banks of the Mississippi River and flood the lands owned by Walker have no "well-defined, passable channel." *Id.* The occasional floodwaters that submerge Walker's property are not "predictable or reliable." *Id.* It defies logic, common sense and applicable law to suggest that these temporary floodwaters, which on rare and unpredictable occasions cover the lands owned by Walker, are, in the words of the court in *Lykes Bros.*, "susceptible of being used as an artery of commerce"

and, therefore, navigable. *Lykes Bros.*, 821 F.Supp. at 1464.[8]

After a full presentation of evidence by all of the parties, the Louisiana Second Circuit Court of Appeal found that Gassoway Lake is "landlocked," "not connected to a navigable body of water" and, therefore, "can serve no useful *commercial* purpose." [Emphasis supplied]. *Walker Lands*, 871 So.2d at 1264-66. Moreover, the drainage ditch by which the Petitioners gain access to Gassoway Lake is "completely dry for most of the year," making the lake inaccessible by boat most of the time. Finally, the Louisiana Second Circuit found – as did the United States Fifth Circuit – that recreational use of a waterbody is *not* use for a commercial purpose. *Id.* at 1266; *Parm*, 513 F.3d at 143.[9] Accordingly, "Gassoway

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[8] As the court in *Loving v. Alexander*, 548 F.Supp. 1079 (W.D. Va. 1982), *aff'd.*, 745 F.2d 861 (4th Cir. 1984), said:

> . . . susceptibility for use or actual usage implies regularity and predictability of usage. 'If the waterway is merely capable of exceptional transportation during periods of high water, *it is not navigable*.' [Emphasis supplied].

Id. at 1086-87.

[9] *See* also *Kieff v. Louisiana Land and Exploration Company*, 779 So.2d 85 (La. App. 4 Cir. 2001), which directly refutes Petitioners' argument here that navigation rights should not be limited to commerce but should be extended to include recreational use. In *Kieff*, the court considered what constitutes "navigability" in the context of the Louisiana recreational use immunity statutes (La. R.S. 9:2791 and 9:2795). The court held that commerce or potential commerce on a body of water was

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Lake is a non-navigable body of water that is owned by a private entity" – namely, Walker. It is, therefore, "a private thing." *Walker Lands*, 871 So.2d at 1266.

Finally, in a case closely analogous to the one at bar, *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991), the Eleventh Circuit Court of Appeal addressed the same navigability and public access issues confronting this Honorable Court. In *Harrell*, the U.S. Army Corps of Engineers (the "Corps") challenged the trial court's finding that Lewis Creek, a tributary of the Tombigbee River, itself "a major artery of *commerce*," was *not* a navigable waterway. [Emphasis supplied]. *Id.* at 1037-38. Like Petitioners here, private parties also claimed a right of access to Lewis Creek during times of high water for purposes of fishing. The Harrells, riparian landowners, claimed that the private parties had no right to fish the stretch of Lewis Creek that ran through their property, since that portion of the creek was non-navigable.

The Harrells' property, like Walker's in this case, abutted "a major artery of commerce," namely, the Tombigbee River. Like the property at issue here, in its ordinary condition the Harrells' land was covered with grasses, trees and other terrestrial vegetation because it was not under water except for very short

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determinative of the navigability issue. "The fact that an oysterman or a crabber might, on occasion, pass through the area . . . on a small boat does not make it a highway for interstate or foreign commerce." *Kieff*, 779 So.2d at 92.

periods of time. *Id.* at 1042. The evidence presented in *Harrell* also established that Lewis Creek only became capable of use for commerce when the floodwaters of the Tombigbee River broke out of their banks on the main course of the river and backed-up across the intervening lands into Lewis Creek. *Id.* at 1039. That is the exact situation presented in this case. Gassoway Lake and the other Walker properties to which Petitioners claim a right of access and use only contain water sufficient to float small boats when the Mississippi River – whose channel is located three and one-half miles from Gassoway Lake – overflows its banks and its floodwaters meander over low-lying portions of Walker's land.[10]

In reaching its conclusion that Lewis Creek is non-navigable, the court was persuaded that Lewis Creek – which, like Gassoway Lake, was located three miles from the Tombigbee River – "is impassable

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[10] It is significant that in *Harrell* the court found that Lewis Creek was not navigable-in-fact even though it was used for commerce during times of high water by the private parties who commercially fished the creek. The evidence also established that in the past others had used the creek for commercial purposes such as floating logs, poles and rafts downstream. Even with that evidence, however, the court held that such activities do "not make [Lewis Creek] a navigable river." *Id.* at 1038 and 1040; *see* also, *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770, 773 (1899). This Court should draw the same conclusion in this case, particularly in light of the fact that Petitioners here have presented no evidence whatsoever of any commercial use of Gassoway Lake or the other waters at issue.

under *ordinary* conditions prevailing throughout the year." *Id.* at 1040. Relying on this Court's decision in *United States v. Utah*, 283 U.S. 64, 51 S.Ct. 438, 445 (1931), the *Harrell* court reasoned that "susceptibility of use as a highway *for commerce* should not be confined to 'exceptional conditions or short periods of temporary high water.'" [Emphasis supplied]. *Harrell*, 926 F.2d at 1040.

As stated above, Petitioners in this case do not even allege that they or others have made any *commercial* use of the "waters" in question, nor do they allege that Gassoway Lake and the other so-called water bodies upon which they have trespassed were ever used for navigational *commerce* or are presently susceptible for such use. They have alleged only – and erroneously – that the floodwaters that occasionally cover low-lying portions of the three and one-half miles of land located between the Mississippi River and Gassoway Lake are part and parcel of the unquestionably navigable waters of the Mississippi River and, therefore, they and the public in general have a right to navigate over and fish on the waters of the Mississippi River. This Court should reject their argument in this regard because, as the Louisiana Second Circuit Court of Appeal has already found, Gassoway Lake does not lie in the bed of the Mississippi River, nor is it a channel of the river since it is cut off from it. *Walker Lands*, 871 So.2d at 1264. Accordingly, that court upheld the trial court's finding that Gassoway Lake, the drainage ditch and other "water bodies" are not navigable bodies of water. *Id.*

at 1266. This Court should reach the same conclusion.

B. Petitioners Cannot Establish a Public Right of Access or Use Through the Federal Navigational Servitude.

In *Harrell, supra,* the court also addressed the Corps' claim that as a result of the Tombigbee floodwaters, Lewis Creek was subject to the navigational servitude of the United States. Employing logic, common sense and applicable case law – in particular opinions rendered by this Court – the Eleventh Circuit rejected the Corps' argument. The court noted that "navigability" is a federal question and reviewed decisions by the federal courts establishing the rule that the government's navigational servitude does not extend beyond the "ordinary high water mark." *Harrell*, 926 F.2d at 1041-42. The court assessed the Corps' regulatory definition of "ordinary high water mark" in light of the "limits set forth by the federal courts." *Id.*

The Corps argued that its "navigational servitude extends laterally over the entire area covered by the ordinary high waters of the stream, including tributaries that might not otherwise be considered navigable and areas adjacent to the low water channel that revert to a swampy or even a dry condition as the waters recede." *Id.* at 1043. That is the same argument made by Petitioners in this matter. In rejecting the Corps' claim, the *Harrell* court held:

> We reject any attempt by the Corps to extend . . . the regulatory jurisdiction of the United States to farmland and hardwood forests in these bottomlands simply because the Tombigbee River periodically floods its banks during the winter and spring wet months. *To argue that the government's jurisdiction should extend laterally as much as three miles on either side of the Tombigbee River is ludicrous.*
>
> * * *
>
> [To adopt the Corps' definition] 'would recognize no horizontal limits to the 'bed' of a navigable river in those areas where the banks are relatively low and flat. . . .'
>
> * * *
>
> There must . . . be horizontal limits to the 'bed' of a river; otherwise, the navigational servitude would extend indefinitely in all directions and swallow up any claim for 'just compensation' under the Fifth Amendment for damages occurring anywhere below the elevation of the high-water mark. [Emphasis supplied].

Id. at 1043.

As the Fifth Circuit did in this case, the *Harrell* court acknowledged that state law governed the question of "public access to Lewis Creek during periods when the Tombigbee floods its banks." *Id.* at 1044. However, since the State of Alabama does not own non-navigable waters, such as Lewis Creek, the

court held, "the public has no right of access." *Id.* Similarly, under Louisiana law, the public owns "the waters and bottoms of natural navigable water bodies," while the banks are "private things" belonging to the riparian landowner and subject to very limited public uses. *See* La. Civ. Code Ann. arts. 450 and 456.

Wisner respectfully submits that the decision in *Harrell* is on point and, together with the decision of the Louisiana Second Circuit Court of Appeal in *Walker Lands, supra,* and the great weight of this Court's many prior decisions, should be regarded as dispositive of the issues of navigability, the federal navigational servitude and the public right of access to privately owned property.

C. The Fatal Flaw in Petitioners' Claim Is that They Did Not Establish that the "Waters" to Which They Seek a Right of Access Are Navigable.

The fact that applicable law – as cited by Petitioners themselves – requires that the waters to which they seek a right of access and use be navigable is the fatal flaw in their argument. Petitioners acknowledge the navigability requirement only in a general manner and then pretend that they have satisfied it, without citing any supporting evidence.

Nearly every case cited and relied upon by Petitioners in their Petition to this Court specifically states that the public has no right of use as to waters that are not "navigable." Petitioners, however,

proceed in their arguments as though the requirement is non-existent or had somehow been met by them, despite their failure to cite any evidence to that effect. The following authorities relied upon by Petitioners establish that the public's right to access and use is conditioned on proof that the waters are or were historically navigable – i.e., used or susceptible to being used for commerce: *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842) (Pet. for Writ, pp. 21-22 and 26); *Morris v. U.S.*, 174 U.S. 196, 19 S.Ct. 649 (1899) (Pet. for Writ, p. 22); *The Volant* [cited by Petitioners as *Smith v. Maryland*], 59 U.S. 71, 1855 WL 8275 (1855) (Pet. for Writ, p. 23); *Slaughter-House Cases*, 83 U.S. 36, 1872 WL 15386 (1873) (Pet. for Writ, pp. 23-24); United States Congressional Statutes at Large, Vol. 2, pp. 642 and 703 (1811) (Pet. for Writ, p. 25); *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548 (1894) (Pet. for Writ, p. 26); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 33 S.Ct. 667 (1913) (Pet. for Writ, p. 27); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 70 S.Ct. 885 (1950) (Pet. for Writ, p. 27); *Gibson v. United States*, 166 U.S. 269, 17 S.Ct. 578 (1897) (Pet. for Writ, p. 27); *Coastal Petroleum Co. v. United States*, 524 F.2d 1206 (5th Cir. 1975) (Pet. for Writ, p. 27); 33 C.F.R. 329.11(a) (Pet. for Writ, p. 28); *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499 (1894) (Pet. for Writ, p. 30); *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979) (Pet. for Writ, p. 31); *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir. 1931) (Pet. for Writ, p. 31); *Merrill-Stevens Co. v. Durkee*, 62 Fla. 549, 57 So. 428 (1912) (Pet. for Writ, pp. 31-32 and 34); *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576 (La. 1974) (Pet.

for Writ, p. 33, n. 16); *O'Brien v. State Mineral Bd.*, 24 So.2d 470 (La. 1945) (Pet. for Writ, p. 33 n. 16); *State v. Barras*, 615 So.2d 285 (La. 1993) (Pet. for Writ, pp. 33-34); *Glass v. Goeckel*, 703 N.W.2d 58 (Mich. 2005), *cert. denied*, 546 U.S. 1174, 126 S.Ct. 1340 (2006) (Pet. for Writ, p. 34); *Ryals v. Pigott*, 580 So.2d 1140 (Miss. 1990) (Pet. for Writ, p. 34); *Gwathmey v. State*, 464 S.E.2d 674 (N.C. 1995) (Pet. for Writ, p. 34); *Delinks v. McGowan*, 173 A.2d 488 (Conn. 1961) (Pet. for Writ, p. 34); *City of Providence v. Comstock*, 65 A. 307 (R.I. 1906) (Pet. for Writ, p. 34); and *Thiesen v. Gulf F. & A. Railway Co.*, 78 So. 491 (Fla. 1917) (Pet. for Writ, p. 34).

Thus, throughout their Petition, Petitioners acknowledge that applicable law allows the public access and use of the waters of the United States and the various states *only* if those waters are "navigable." Nevertheless, Petitioners have presented their Petition for Writ of Certiorari to this esteemed and Honorable Court – which itself established the navigability requirement for public access to federal and state waters – without addressing this most axiomatic of principles and with full knowledge that they have not satisfied the requirement. For this reason alone, Petitioners should be denied relief by this Court.

CONCLUSION

The central issue in the case confronting this Honorable Court involves a determination whether Gassoway Lake, the drainage ditch and other parts of

Walker's property are navigable-in-fact and, therefore, navigable-at-law. Contrary to Petitioners' far-reaching arguments, sweeping mischaracterizations of the facts and erroneous statements of the law, there are clear legal precedents in analogous cases that this Court has previously decided, which establish that a determination of navigability rests on whether the water body at issue is or ever was navigable-in-fact, i.e., capable of supporting interstate commerce. The law, the facts and common sense mandate that Petitioners' attempts to overturn more than a century of well-settled law established by this Court regarding navigability, and to have this Honorable Court grant them the right to trespass at will on private property, be rejected. The preservation of one of the most important foundations of our democracy – the right to enjoy one's private property without interference from others – depends on it.

Respectfully submitted,

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In The

Supreme Court of the United States

NORMAL PARM, JR., ET AL.,

Petitioners,

v.

MARK SHUMATE, IN HIS OFFICIAL CAPACITY AS SHERIFF OF EAST CARROLL PARISH, LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE*, WALKER COTTONWOOD FARMS, LLC, SUCCESSOR-IN-TITLE TO WALKER LANDS, INC., IN SUPPORT OF OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Walker Cottonwood Farms, LLC ("Walker"), is the owner of property in East Carroll Parish, Louisiana ("the Property"), on which Petitioners were arrested for trespassing while engaged in recreational pursuits on non-navigable water bodies. Walker has a significant interest in the determination of the issues presented in this case as those issues directly impact Walker's rights as owner to preserve, develop, and enjoy the Property.

Walker files this *amicus* brief to protect not only the decision of the Fifth Circuit Court of Appeals, but also the final Louisiana state court judgment that Walker obtained after nine years of state litigation, which reached a definitive determination of many of the factual and legal issues that underlie the Petition. *See Walker Lands, Inc. v. East Carroll Police Jury*, 871 So.2d 1258 (La. App. 2nd Cir. 2004), *writ denied*, 903 So.2d 442 (La. 2005), *reconsideration not considered*, 916 So.2d 127 (La. 2005) (the "State Court Proceeding"). [Pet. App. at 101] Petitioners and their supporters, including the Waterways Access

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. All parties consented to the filing of briefs of *amici curiae*.

Association, appearing in this Court as one of the *amici*, were the driving force in the State Court Proceeding, in which Louisiana's former Attorney General unsuccessfully asserted the rights of the public to enter and exploit Walker's Property. This federal case, therefore, has been in many respects a reprise of the State Court Proceeding, whose findings and judgment the Fifth Circuit properly respected and upheld in resolving the narrow, localized issues presented by Petitioners' appeal.

Should Petitioners and their *amici* succeed in obtaining the sweeping changes they seek in federal and state law, Walker, its Property, and countless other owners of Louisiana properties stand to suffer permanent and irreparable injury. Fundamental fairness calls for Walker, as the owner of the Property that Petitioners seek to use and exploit, to have the ability to defend its rights against the claims of these serial trespassers. No less an interest than that of persons to own and enjoy their private property, free of the unwanted interference of others, is at stake. Equally important, and similarly ignored by Petitioners, is the federal government's ability to define the limits of its jurisdiction over the navigable waters of America and to control and foster navigation free of matters that are left to the States to administer and control.

Moreover, having litigated the access right to this Property for over twelve years in Louisiana's state and federal courts, Walker is uniquely positioned to provide important facts about the Property and the

State Court Proceeding, as well as to supply relevant legal authority to assist in reviewing the Petition. Accordingly, Walker welcomes the opportunity to address this Court and to support the Fifth Circuit's decision, which found that Petitioners were on Walker's Property in clear violation of Louisiana law and that no federal law or policy supports their right to access or use any portion of the Property.

INTRODUCTION

The resolution of the Petition must rest in large measure on the factual findings and holdings in the State Court Proceeding, which litigated factual and legal issues concerning the very Property and addressed the same activities and arrests that are the subject of the Petition. The Fifth Circuit properly relied on the findings and legal conclusions made in this decision to reject Petitioners' claims under both Louisiana and federal law. Nothing in the decision below, or the State Court Proceeding, implicates either the federal policies or the interests of states other than Louisiana that Petitioners and their *amici* seek to inject into this action.

COUNTERSTATEMENT OF FACTS

Petitioners' primary arguments rest on the supposition that they seek to fish on some portion of the navigable Mississippi River. This inaccurate

assertion portrays Walker's Property and its non-navigable waters as being directly adjacent to the Mississippi River shipping channel and in continual communication with – and perhaps even part of – the Mississippi River. As found in the State Court Proceeding and in the courts below, these assertions are completely incorrect.

Petitioners were and have been arrested after refusing to leave Walker's Property while fishing on non-navigable lakes and temporarily flooded lands that are situated nearly 3½ miles from the Mississippi River in the extreme northeast corner of the state of Louisiana, far from any coastal or tidal waters of the Gulf of Mexico.[2] [Pet. App. at 104-06] As the Louisiana court recognized, this Property has been closed for public fishing at least since the 1960s. [Pet. App. 103; App. p. 8] Regardless of the ordinary levels of the Mississippi River, the shallow water bodies on the Property are not accessed or accessible by boating west from the Mississippi River's channel.

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[2] The Property at issue in this case lies between the levee constructed by the Corps of Engineers and the Mississippi River 3½ miles to the east. To the extent the Property is covered by ordinary seasonal flood waters, this temporary inundation is a direct result of the existence of the levee, which retains the waters on Walker's Property and does not permit them to spread farther westward, where they would inundate the homes, businesses, and properties of others, including Petitioners. Petitioners thus seek not only to enjoy the protection of the levee, but also, as a result of the location of the levee on Walker's Property, to subject the Property to untrammeled public uses, including fishing and even hunting.

Trespassers are able to access the Property only by road or by launching small boats into Bunch's Cutoff, and from there, by making their way – sometimes by disembarking from, walking alongside, and dragging their boats – through a man-made drainage ditch and sometimes over dry land into Lake Gassoway and the other lakes on the Property.[3] [Pet. App. 3] The topography of the Property does not change from year to year as Petitioners suggest in asserting that the "mighty Mississippi" chooses its path southward, bounded only by the levees. In reality, the Corps of Engineers ("Corps") maintains the Mississippi within its channel, and except in highly unusual

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[3] The Louisiana trial court findings, which were accepted by the Louisiana appellate court, included the following findings concerning this drainage ditch:

> The Court further finds that the outlet channel/drainage ditch is in fact a drainage ditch of Gassoway Lake, that has been altered by man and is not a navigable stream as perceived by the Civil Code. . . .
>
> [The ditch] makes a ninety degree angle at one point, due to materials placed by man. . . .
>
> During many times of the year, the ditch has insufficient water for the smallest of boats to travel from Bunch's Cutoff up through the ditch into Gassoway Lake. . . .
>
> [T]he amount of vegetation in the ditch prohibits traversal of this area during certain times of the year and even during high water, one would have to leave the banks of the ditch and cross private land and run along beside the ditch in order to gain access to Gassoway Lake.

[App. pp. 10, 13]

circumstances, has done so for decades. Based upon extensive expert testimony, the trial court in the State Court Proceeding found that the channel of the Mississippi last flowed over the location of what is now Walker's Property more than 100 years ago. [App. pp. 13-15]

The Louisiana Court of Appeal found that the area between Lake Gassoway and the Mississippi River, 3½ miles away, is "dry land." The water bodies on the Property remain landlocked most of the year and can serve no useful commercial purpose.[4] [Pet. App. at 104-06] As the Fifth Circuit's opinion observes, several buildings and 140-foot-tall trees are on the Property. [Pet. App. at 3] Walker farms the Property, and there are roads, airstrips, a concrete bridge, farm buildings, and hardwood forests, as well as lakes, ditches, and borrow pits on the Property. The Property's elevation reaches 125 feet above mean sea level. *See, e.g.*, Pet. App. 123 (USGS topographical map) and the most recent Corps of Engineers navigational map (1998), in Respondent's appendix.[5]

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[4] Under settled law, such sloughs, creeks, and ditches that connect with navigable streams are not thereby made navigable if not used as highways of commerce, and the navigation servitude is not applicable even if navigable waters back up into them. *Zunamon & Chicago Mill & Lumber Co. v. United States*, 221 Ct. Cl. 835, 1979 WL 10393 (Ct. Cl. 1979).

[5] Had the Fifth Circuit applied the "vegetation test" under 33 C.F.R. §329.11(a), these physical attributes of the Property easily would have established that it lies above the Mississippi River's "ordinary" high water mark, which limits federal

(Continued on following page)

Based on facts as found in the State Court Proceeding, the Property and water bodies on it are not part of the Mississippi River. Additionally, the Louisiana courts held that Walker owns the water bottoms and land on which Petitioners were arrested because under Louisiana law, the State owns the beds or bottoms of water bodies in a sovereign capacity only up to the ordinary low water stage, and evidence in the State Court Proceeding showed that the Property lies above the low water stage of the Mississippi River. [Pet. App. at 105 fn. 7, 115] Thus, the primary legal issue in the State Court Proceeding was whether the public, including Petitioners, could go onto Walker's privately-owned Property to fish, hunt, camp, and conduct other activities. The Louisiana courts decided that issue in Walker's favor:

> Gassoway Lake and surrounding lands between the lake and the river are sometimes flooded by the Mississippi River. Privately owned land does not become part of a navigable body of water when a nearby navigable body of water overflows its normal bed and temporarily covers the property. Gassoway Lake is landlocked and does not now lie in the bed of the Mississippi River, which is some three and one-half miles to the east;

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jurisdiction at the point on the river bank where there is a clear demarcation.

> likewise, it is not a channel of the river, since it is cut off from it.

[Pet. App. at 111]

Under controlling Louisiana law, non-navigable water bodies like those on Walker's Property are subject to the law governing dry land. *See* La. Civ. Code art. 506 cmt. d. [Pet. App. at 113] Louisiana courts hold that property lying between the river and the levee is not the "bank" of a navigable river. "[F]our to five miles distance [between the levee and a river] cannot, in my view be construed as being in proximity to the river." *State v. Barras*, 602 So. 2d 301, 304 (La. App. 3rd Cir. 1992), *aff'd*, 615 So. 2d 285 (La. 1993). And, even if the Property were deemed to be the "bank" of the Mississippi River, Louisiana law permits use of the river bank only for purposes of navigation, which do not include fishing and hunting. [Pet. App. 119-20 fn. 16]

Of direct importance to Petitioners' § 1983 action, the Louisiana appellate court ruled unequivocally:

> Walker Lands does, however, have a right to prevent its private property from being exploited. It has the same rights as all other owners of private property against a person or entity who invades its land and that is to enforce its rights as a private landowner through use of the trespass statutes, to seek specific damages against a person or entity or to ask for an injunction against a specific person or entity. . . . Owners of private property may forbid entry to anyone for purposes

> of hunting or fishing and the like. La. C.C. art. 3413.

[Pet. App. at 118-19] The Louisiana Supreme Court denied further review of this ruling. 903 So.2d 442 (La. 2005).

The State Court Proceeding that Walker litigated to finality thus settled the elements necessary to support dismissal of Petitioners' federal action challenging their arrest. The final decision (i) found the Property and its waterbodies to be non-navigable and private, (ii) held that temporary flooding by Mississippi River waters does not alter the character of the Property, (iii) acknowledged the absence of any right of use by the public for fishing, hunting, or other activities, and (iv) authorized the arrest of trespassers. This decision cannot be ignored or altered to serve the mission of Petitioners and their *amici* to create heretofore unknown rights under federal law. The Fifth Circuit properly rejected Petitioners' collateral assault on the holdings of the Louisiana courts. *See* 28 U.S.C. §1738; *Allen v. McCurry,* 449 U.S. 90 (1980); *A.L.T. Corp. v. Small Business Admin.,* 801 F.2d 1451 (5th Cir. 1986). *See also United States v. Harrell*, 926 F.2d 1036, 1044 (11th Cir. 1991) (applying Alabama law to deny fishermen access to non-navigable river tributary). Petitioners' arguments, which have attained even more hyperbolic proportions in this Court, should be rejected here as well.

SUMMARY OF ARGUMENT

The most obvious reason why certiorari should be denied in this case is that Petitioners were arrested on *non-navigable waters*.[6] Under the governing Louisiana law, this factual finding renders Walker's Property, including its non-navigable water bodies, private – even when temporarily inundated by waters from the Mississippi River. [Pet. App. at 114-15]

Consequently, Petitioners' refrain that they seek to protect the right to recreation in the navigable waters of the U.S., and that the courts below have struck an unprecedented blow to this right, is a hollow argument. The Fifth Circuit merely reiterated long-established law that the federal navigational servitude has never included recreational fishing. Indeed, no "recreational use exclusion" could possibly exist because the right to recreate on navigable federal waters has never been recognized; therefore, that right was not "excluded" from the activities that

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[6] Navigability is a factual issue. *See Indian Bayou Hunting Club, Inc. v. Taylor*, 261 So.2d 669, 671 (La. App. 3rd Cir. 1972) ("A test of the navigability of water bottoms is that those which are navigable in fact must be regarded as navigable in law. . . . "); *Trahan v. Teleflex, Inc.*, 922 So.2d 718, 722 (La. App. 3rd Cir. 2006) ("Navigability is a question of fact and must be proven."). The test for navigability utilized in the State Court Proceeding is similar to the test under federal law as set forth in *The Daniel Ball*, 77 U.S. 557 (1870). *See* Pet. App. 113. ("A body of water is navigable in fact if it is capable of being used for a commercial purpose over which trade or travel are or may be conducted in the customary modes of trade and travel.").

are authorized as "navigation," as it was never included.

As is easily gleaned from a reading of the Petition, each of Petitioners' federal law theories pertains to certain rights to use navigable waters located in a navigational channel used in commercial navigation. Therefore, even assuming there were a right protected by some constitutional, statutory, or common law theory to fish in navigable waters, such a right would be irrelevant here. Consequently, because the decision below does not involve *navigational* rights in *navigable* waters, Petitioners' arguments do not merit further consideration.

ARGUMENT

1. The public has no right to recreation on private property under the Privileges and Immunities Clause.

Section I of the Fourteenth Amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." As in their arguments under other theories, Petitioners assert that the Privileges and Immunities Clause protects recreational fishing rights in navigable waters – a proposition that is not supported by the cases cited by Petitioners. Those cases need not concern the Court, however, because even if the Privileges and Immunities Clause protects fishing in certain parts of navigable rivers, the Fifth Circuit's prohibition to the public use of overflow

waters on private, non-navigable property would not conflict with the jurisprudence under the Privileges and Immunities Clause.

Petitioners' cited cases are simply not on point. Moreover, consistent with the Privileges and Immunities Clause, the holdings in many of Petitioners' cases place limitations on the public's rights. For example, *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855), cited as reaffirming the People's right of "use and ownership of the navigable waters and right to use the abundance of the fishery therein," holds that Maryland could impose forfeiture of a vessel harvesting oysters below the low-water mark of Chesapeake Bay; although the State held the property in trust for public rights, including fishery, the State could regulate exercise of those rights. *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842), cited for the right of all citizens to "piscary (fishing) in the navigable waters of America," holds that the right to maintain oyster beds in "public rivers and bays" of New Jersey belongs to the owner of the soil under the water. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872), cited for the constitutional privilege and federal "common" right of "travel, navigation, and fishing," noted, in *dicta,* only that the "right to use" navigable waters is protected by the Privileges and Immunities Clause. The right at issue in *The Slaughterhouse Cases*, to practice butchering without restriction, was not within the clause. Finally, *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1978), cited as reaffirming the constitutional right of navigation, held only that big game hunting was *not*

protected by the Privileges and Immunities Clause and that state game laws are constitutional.[7]

The Privileges and Immunities Clause has nothing to do with the right Petitioners ask this Court to create: the right to come upon and use the private property of a fellow citizen. Indeed, if anything, such a right would be antithetical to the right of every citizen, including Walker, "to acquire and possess property of every kind," a right enumerated in *The Slaughterhouse Cases*, 83 U.S. at 76, as protected by the Privileges and Immunities Clause.

2. The public has no right to recreation on private property under the Public Trust Doctrine.

Petitioners distort the Public Trust Doctrine by pulling isolated phrases from inapplicable judicial decisions. The Public Trust Doctrine holds only that upon admission to the Union by Act of April 14, 1812,[8] 2 Stat. 641, 642, Louisiana acquired sovereignty of

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[7] Although the Petition cites no authority for the right to hunt on navigable waters, Petitioners and others have, in fact, sought to use Walker's Property for hunting, an activity that could be encompassed within the right of "recreational use," which could be construed to encompass myriad activities.

[8] The water bodies on the Property did not exist in 1812. [Pet. App. at 7] Therefore, in addition to other reasons, Petitioners' arguments fail because even if the Property were navigable (it is not), Louisiana would not have acquired ownership through the Equal Footing Doctrine.

the *navigable* water bottoms in the state on equal footing with the original 13 states, limited only by "the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana v. United States*, 450 U.S. 544, 551 (1981). *See also Dardar v. Lafourche Realty Co.*, 985 F.2d 824 (5th Cir. 1993). Petitioners' reliance on the Public Trust Doctrine rests on a series of invalid premises: first, they incorrectly characterize the Property as Public Trust waters; second, they contend that the federal navigational servitude burdens the Property; and third, they assert that the federal navigational servitude would allow them to fish, hunt, and pursue other recreational activities on the Property.

The Public Trust Doctrine does not apply to Walker's non-navigable property. *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 479 (1988) (*citing Smith v. Maryland*); *Shively v. Bowlby,* 152 U.S. 1, 26 (1894). As the Fifth Circuit recognized, "The navigational servitude does not burden land that is only submerged when the river floods." [Pet. App. at 15 (*citing Oklahoma v. Texas*, 260 U.S. 606, 632 (1923); *United States v. Harrell*, 926 F.2d 1036, 1041-43 (11th Cir. 1991); *United States v. Claridge*, 416 F.2d 933, 934 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970))]

This rule derives from the principle that navigability for the purposes of the federal navigational servitude extends only to a river's "ordinary" high water mark as defined under 33 C.F.R. §329.11(a), under which federal jurisdiction ends at the clear

demarcation on the river bank between the river and the uplands – as seen by destruction of terrestrial vegetation, litter or debris, changes in the character of the soil, or similar characteristics. As shown by maps and photographs in evidence, this test places Walker's Property entirely above the "ordinary" high water mark and, therefore, outside the federal navigational servitude.[9]

Petitioners' argument for application of the federal navigational servitude over temporarily flooded property was refuted in *United States v. Harrell*, 926 F.2d 1036, which the Fifth Circuit cited with approval. [Pet. App. at 15, 16] In that case, similar to Petitioners' contentions, the Corps argued that the federal navigational servitude included Lewis Creek, a privately owned non-navigable tributary subject to overflow from the navigable Tombigbee River. Based on the Corps' assertion, a group of sportsmen claimed access to Lewis Creek during times of high water. The Eleventh Circuit soundly rejected the attempt to extend the federal navigational servitude over the temporarily submerged property:

> The definition of "ordinary high water mark" advanced by [the Proponent] would extend

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[9] Although the Fifth Circuit was not able to make a definitive determination of the federal high water mark on the Property, the court observed, based on available evidence, that "it is unlikely that it includes much of the Property." [Pet. App. 16 fn. 4 (*citing Harrell*, 926 F.2d at 1043)]

> the regulatory jurisdiction of the United States to *farmland and hardwood forests in these bottom lands* simply because the Tombigbee River periodically floods its banks during the winter and spring wet months. *To argue that the [U.S.] government's jurisdiction should extend laterally as much as three miles on either side of the Tombigbee River is ludicrous.*

Id. at 1043 (emphasis added). The court recognized that the Corps' proposed definition "would recognize no horizontal limits to the 'bed' of a navigable river in those areas where the banks are relatively low and flat. . . ." *Id.* As the *Harrell* court acknowledged, arguments for such a limitless federal servitude must be rejected – not only because unsupported by law but for obvious practical reasons as well.

If Walker's Property were subject to the federal navigational servitude, hundreds of thousands of acres of other privately-owned property in Louisiana also would suddenly be subject to recreational fishing, hunting, and "other uses." The property rights of any owner whose premises may be seasonally flooded would be threatened. Some of this property is residential, such that homeowners would be faced with strangers fishing and even hunting in their backyards. Shipping facilities and manufacturing plants on the banks of navigable rivers would be accessible to anyone carrying a fishing rod or rifle – with obvious security risks. The taxpayers would bear the brunt of funding the compensation that would be paid

for such "takings," while state and local jurisdictions could lose millions of dollars in property tax revenues.[10] Titles to all seasonally flooded property would be clouded, complicating real estate sale and loan transactions. Plainly, Petitioners' short-sighted arguments do not warrant such radical changes to fundamental principles of property law.

Moreover, even assuming that a navigational servitude were to apply, its imposition would be limited by *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), in which this Court held that the Corps' regulatory jurisdiction does not allow public access to privately-owned property incapable of use as a continuous highway of commerce. As the Court held in *Kaiser,* "while Kuapa Pond may be subject to regulation by the Corps of Engineers, . . . it does not follow that the pond is also subject to a public right of access." 444 U.S. at 172-73. Because the State Court Proceeding found Walker's Property incapable of serving any useful commercial navigation purpose, under *Kaiser*, there can be no public right of access even if the Property were subject to federal regulation.

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[10] Riparian owners face the risks of loss of valuable property due to natural changes in the river course; however, this risk does not include extensions of the navigational servitude to include recreational fishing and hunting. The navigational servitude cannot be extended without compensation to private landowners.

Finally, in addition to not providing public access to private property, the federal navigational servitude does not afford Petitioners with the right to fish, hunt, camp, or pursue similar activities. Such activities do not constitute navigation and, indeed, would interfere with navigation. While some cases recognize that the federal right of navigation encompasses federal interests such as flood control, these cases do not extend that interest to recreational fishing and hunting. None of the cases cited by Petitioners stand for the novel proposition that they are entitled to conduct recreational activities in all waters governed by the federal navigational servitude.[11] Indeed, the case law is to the contrary. *See Phillips Petroleum*, 484 U.S. at 482-84 (acknowledging that fishing is not related to navigability); *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968) ("Although the rule on navigability has been at times liberalized, to our knowledge none of the authoritative cases has liberalized the rule so as to indicate that mere pleasure fishing on a stream of water is such usage as would

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[11] The Petition's reliance on decisions that define the extent of private ownership rights in property burdened with the federal servitude for navigation, including the right to compensation in "takings" cases, misreads those decisions, which do not address the recreational rights Petitioners seek in property that is not burdened with the servitude. *See United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *Gibson v. United States*, 166 U.S. 269 (1897); *Coastal Petr. Co. v. United States*, 207 Ct. Cl. 701, 524 F.2d 1206 (Ct. Cl. 1975).

constitute navigability."). The Fifth Circuit did not create new law in following these cases.

The federal navigational servitude exists only by virtue of the Commerce Clause for the purpose of allowing the U.S. government to preserve "navigation in interstate commerce." *Kaiser,* 444 U.S. at 178; *Vaughn v. Vermillion*, 444 U.S. 206 (1979); *Dardar v. Lafourche Realty Co.*, 985 F.2d 824, 832 (5th Cir. 1993). The right of the government in navigable waters is "limited to the control thereof for the purposes of navigation." *Port of Seattle v. Oregon & Washington R.R.*, 255 U.S. 56, 63 (1921). A federal navigational servitude may not arbitrarily destroy or impair the rights of riparian owners absent a real or substantial relation to control of navigation. *United States v. River Rouge Improv. Co.*, 269 U.S. 411, 419 (1926). The Fifth Circuit correctly followed this jurisprudence. [Pet. App. at 16-17]

3. Federal common law does not support public access to private, non-navigable property.

Failing a right to pursue their activities under constitutional, statutory, or regulatory law, Petitioners next assert a federal common law right to recreation on private water bodies under the "broad and flexible" common law right of navigation. Neither Petitioners nor their *amici*, however, cite any constitutional, statutory, or jurisprudential provision that would require the federal courts to make common law in contravention of specific state laws in an area that

is subject to regulation by the various states. The Fifth Circuit properly declined to create such law.

Contrary to Petitioners' contentions, the federal common law may not supplant state law in areas that are of no interest or concern to Congress. *See Danforth v. Minnesota*, 128 S.Ct. 1029, 1046 fn. 24 (U.S. 2008) (*citing Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) ("[W]e have held that a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed . . . by the courts – so-called 'federal common law'"). Federal common law may be created only when state law would significantly conflict with "uniquely federal interests." *Boyle*, 487 U.S. at 508. The right to recreation on private, non-navigable property is not a uniquely federal interest. As the Fifth Circuit held after reviewing Petitioners' arguments under Louisiana and federal law, "In any event, as things now stand, the right to fish on public trust lands is governed by Louisiana law, and there is no reason for us to displace that law by adopting a federal rule of decision in this context." [Pet. App. at 18] This conclusion is eminently correct.

Petitioners argue that a federal common law right to hunt and fish on submerged riparian lands was found in cases such as *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir. 1931). *Silver Springs* is inapplicable because it involved a claim by riparian landowners to land beneath waters that met the

Daniel Ball navigability "commerce test." Petitioners' citation to *dicta* in other cases is equally unavailing. In *Lawton v. Steele*, 152 U.S. 133 (1894), which Petitioners cite for the alleged common law right to fish navigable waters, the Court held that a fisherman's constitutional rights were not violated by the State's confiscation of his fishing gear under fish and game laws. Similarly, *Scranton v. Wheeler*, 179 U.S. 141 (1900), held that no compensation was due a riparian owner whose access to a public, navigable river was obstructed by a pier constructed by the United States. Finally, *Kaiser Aetna*, 444 U.S. 164, holds only that Congress has authority under the Commerce Clause to legislate access to navigable waters, not that it must do so.

Petitioners' contention that the Fifth Circuit's holding is in conflict and may interfere with the laws of various states is not supported by the very authorities Petitioners cite. Indeed, because state law determines the rights of the public and private owners in non-navigable waters, federal law is not implicated at all. In particular, it is difficult to fathom how Louisiana's uniquely civilian law, derived from the laws of France, Spain, and ultimately, Rome, could impact the property and navigational laws of other states, which derive from the law of England. Petitioner's cited Louisiana case, *State v. Barras*, 615 So.2d 285 (La. 1993), held, consistent with the Fifth Circuit's reasoning, that there was no public right to crawfish on temporarily flooded, private swampland. The law of the other Fifth Circuit jurisdiction that Petitioners

cite, Mississippi, also is not threatened by the Fifth Circuit's holding. Exemplary of Petitioners' other cited cases, *Delinks v. McGowan*, 173 A.2d 488 (Conn. 1961), found only that a statute authorized the State to purchase property for public access to a navigable river. Significantly, however, the court recognized that "the upland owner has the right to prevent the public from crossing the private lands which border on these public domains and are above the high-water mark." *Id.* at 491. And, as recognized by the commentator the Petition cites, "Absent federal preemption under the commerce clause, states have been free to make their own navigability determinations of waters within their boundaries." *See* Comment: *Floating on Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West*, 5 Wyo. Law Rev. 561, 567 (2005). Clearly, what the Fifth Circuit decided with regard to Walker's Property, which is non-navigable and private under Louisiana law, has no practical or legal impact on the laws of other states.

4. Federal statutory law and regulations also do not support public access to private property.

Finally, Petitioners rely on several federal conservation and wildlife protection statutes that purportedly grant a federal right to hunt and fish. *See* Fish and Wildlife Coordination Act of 1985, 16 U.S.C. §§661-668; The Fish and Wildlife Act of 1956, 16 U.S.C. §§742a-742j; The Magnuson-Stevenson

Fisheries Management and Conservation Act of 1996, 16 U.S.C. §1801 *et seq.*; and the Clean Water Act, 33 U.S.C. §1251 *et seq*. Neither these statutes, nor any others, provide public access to the Walker Property.

While portions of some of the statutes Petitioners cite may promote, protect, or recognize the importance of recreational fishing, none of the statutes create, or even mention, the right Petitioners seek to go onto overflow waters located from time to time in the "shallows" on property owned by another for the purpose of pursuing recreational activities. As Petitioners correctly acknowledge, it is for Congress to decide whether it will regulate a particular sphere of activity. Tellingly, Congress enacted the laws Petitioners cite to protect natural resources, but Congress chose *not* to enact legislation providing access to privately-owned property for recreational hunting and fishing. As observed in *Kaiser Aetna*, 444 U.S. at 174, Congress's expansive authority under the Commerce Clause allows it to legislate access to specific *waters if it chooses to do so*. Therefore, the fact that Congress *chose not to speak* on the subject is consistent with the principle that public access and fishery rights may not be inferred from these statutes. *See Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). Courts have a duty to refrain from reading a phrase into a statute when Congress has left it out. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993); *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 936 (11th Cir. 2000)

("[W]e should not be quick to conclude that Congress either neglected to consider an issue related to its enactments, or decided to avoid the issue and leave its resolution to the courts.").

Far from flouting Congress's plenary authority to legislate over navigable waters, the Fifth Circuit's decision recognized that its authority is limited to federal navigable waters where commercial navigation takes place. Petitioners cite no statute or decision evidencing that the Walker Property is used or usable for commercial navigation. The State Court Proceeding produced evidence that the Property was not capable of commercial navigation. Plainly, Petitioners have no federal right for this Court to enforce.

CONCLUSION

Petitioners ask the Court to make sweeping new law that whenever waters from navigable rivers cover the land between the Corps of Engineers levees, private property rights vanish, allowing unfettered public access to hunt, fish, trap, camp, and even commercially exploit private property. Such a determination would overrule centuries of state and federal law. The Fifth Circuit and the Louisiana courts correctly rejected this unwarranted extension of public access law and destruction of private property rights.

WHEREFORE, *amicus curiae* Walker Cottonwood Farms, LLC respectfully requests that this Court deny the Petition.

Respectfully submitted,

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WALKER LANDS, INC. AND HOLLYBROOK LAND COMPANY, INC.	SIXTH JUDICIAL DISTRICT COURT
VERSUS	PARISH OF EAST CARROLL
STATE OF LOUISIANA	STATE OF LOUISIANA
	NO. 17,746
FILED: MAY 1, 2003	s/ Charlotte B. Herrington DEPUTY CLERK

REASONS FOR JUDGEMENT

This matter came on for hearing before this Court as a result of a lawsuit filed originally by Walker Lands, Incorporated and Hollybrook Land Company, Incorporated, hereinafter referred to as Walker and Hollybrook or Plaintiffs, against the East Carroll Parish Police Jury. The State of Louisiana was later joined in the suit. The suit seeks an injunction against certain individuals from using the lake for certain activities including hunting, fishing, trapping, and for commercial, as well as for recreational pursuits. The plaintiffs assert that the property in question, an area in East Carroll Parish, which lies east of the levee adjacent to Highway 65, and includes an unnamed, unpaved road running from Highway 65 to Lake Gassoway, as well as the bed, bottoms, and waters of Lake Gassoway, and a ditch or outlet channel, along with certain other lakes is privately owned and not subject to any right of public access or use. The Attorney General issued an opinion on May 25, 1996, Opinion 26-906, which concluded

that "Lake Gassoway is a naturally navigable body of water under both State and Federal law and actually supports navigation for such purposes as hunting, fishing, trapping, and for limited commercial purposes" in addition to recreational purposes. The opinion further states that the Lake constitutes a navigable "highway of commerce."

On June 10, 1996, the plaintiffs filed the Injunctive suit which is the subject of this opinion. In support of their claims, Plaintiffs pleaded their titles to the Property and the Road and the absence of any right of public use over either the road or Lake Gassoway itself. Plaintiffs sought injunctive relief based upon the violation of their right to own private property and their constitutional rights to due process and equal protection.

On June 12, 1996, this Court issued a temporary restraining order prohibiting the Police Jury and all other persons or governmental agencies from removing the fences placed across plaintiffs' privately-owned roadways and from using such roads or other means of access to Lake Gassoway and from going upon or using Lake Gassoway and the ditch for any purpose, including boating, fishing, and hunting. This restraining order was extended by consent of all parties.

Following the filing of its Answer, the Police Jury filed a third-party demand against the State of Louisiana. This Court ruled that the State of Louisiana was an indispensable party to the suit based on the

alleged duty of the State to defend title to all public lands and any alleged rights of public access to, and use of, Lake Gassoway. On March 11, 1997, Plaintiffs filed an Amended and Supplemental Petition seeking a declaratory judgment declaring that 1) Plaintiffs are the owners of the Road; and 2) are the owners of the bed, bottoms, and waters of Lake Gassoway and of the surrounding land as described in its title. Plaintiffs' Amended and Supplemental Petition also sought a judgment declaring and confirming that certain definitive judgments entered in 1918, 1963, and 1967, which adjudicated the ownership and title to the property at issue to private owners, have *res judicata* effect, and that the Road and the Lake are not subject to any right of public use or to express or tacit public dedication. On October 13, 1997, Plaintiffs joined the State as a direct Defendant, asserting the same claims and demanding the same relief against the State as against the Police Jury.

Upon the filing, briefing, and hearing of three motions for summary judgment filed by Plaintiffs, this Court ruled in favor of Walker and Hollybrook on March 16, 1998, and granted Plaintiffs' request for an injunction. The State appealed this judgment. The Second Circuit Court of Appeal reversed this Court's decision on the summary judgment motions and remanded the case, finding that summary judgment was not an appropriate vehicle to establish the issues of this case. Plaintiffs' application for review was denied by the Louisiana Supreme Court. The

injunction's continued validity was confirmed by this Court by Order of September 24, 1999.

The State in its Answers denied that the bed, bottoms, and waters of Lake Gassoway are free and clear from public use and denied that the Lake was privately owned, but only "to the extent" such ownership was "contrary to the provisions of La. R. S. 9:1101." On October 29, 1999, the State filed a Motion for Leave to File a Supplemental and Amending Answer and Reconventional Demand, alleging that the State owns all running waters in Lake Gassoway and in a number of other lakes, and that the State owns unnamed islands and bars "not attached to the bank at the time of formation and formed in the beds" of the Mississippi River "in the vicinity of the dispute."

The State also claimed ownership or servitudes to Little Gassoway, Doe Lake, Mud Lake, Lost Lake, Snag Lake, and any other lakes or water bodies on the Property (collectively "the other lakes"). In addition, the State claimed Gin Lake and Little Snag Lake, although they are located in Arkansas. The State claims Snag Lake in its entirety, although the State line runs through Snag Lake and only a portion of the southern part is in Louisiana. The State's Motion for Leave was heard on December 30, 1999. This Court denied the State's motion, but because Plaintiffs had claimed possession and ownership, the Court allowed the State, over Plaintiffs' objections, to present any evidence it desired to prove the issues

raised in the State's proposed, but unfiled, amended answer.

The original defendant, the Police Jury, in its defense to Plaintiffs' claims, asserted that the Road was publicly owned and/or impliedly or tacitly dedicated to the public as a result of alleged construction and maintenance of the Road by the Police Jury. By Judgment of September 27, 2000, the Police Jury dismissed all its claims to the Road, and this Court confirmed that the Road was privately owned and maintained. The Police Jury also dismissed its third-party demand against the State. Thus, the issue of the ownership of the Road was resolved in favor of Hollybrook and Walker prior to trial by this Court's Judgment confirming the private ownership of the Road. Therefore, the ownership of the Road was not considered at the trial. Hollybrook's dismissal was confirmed by Judgment dated September 25, 2001, which Judgment fully reserved Walker's rights to pursue all of its claims.[1]

The case was tried on January 10-14, 1999 [sic], and on January 24-27, 1999 [sic], when it was adjourned due to a severe snowstorm. Trial resumed on September 24, 2001, and was completed on September 26, 2001. A total of 40 witnesses testified at the trial, producing a transcript of 2,115 pages. A total of

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[1] Since Hollybrook Land Company, Incorporated, had been dismissed as of September 25, 2002 [sic], Walker Lands, Incorporated, will be referred to as Walker or Plaintiff.

240 exhibits were introduced. This Court allowed the State to raise all issues and introduce any evidence it thought to be helpful to its position. As this Court stated at trial, the Court has received extensive evidence. In addition, as part of the trial, this Court made a site visit to the Property together with representatives of the State and Walker on March 9, 2000, and again on February 8, 2002. On the date of the first site visit, the elevation of the Mississippi River was 97.6 feet, NGVD, and 24.6 on the Vicksburg gauge. On the date of the second site visit, the stage elevation of the Mississippi River on the Vicksburg gauge was 36.2, which is equivalent of an elevation of 109.2, NGVD.

Both the Plaintiff and the Defendant agree that in 1812 when Louisiana was admitted to the Union, Lake Gassoway was not in existence, but was either woods or farm land. The parties agree that the area of dispute was patented to private owners during the 1830's. The parties agreed that the patents were properly issued and the tax records indicate that taxes on the property in question have been paid by private owners. During a period of time between the 1860's and 1870's the Mississippi River system began moving in a westernly direction toward the geographical site now occupied by Gassoway Lake. When the witnesses from the Louisiana State Land Office were called by Plaintiffs at the beginning of the trial, they declared that their department has not made any claims that the State owns any of the lakes or lands on the property in question in its sovereign capacity.

The private owners presented proof that they have been in corporeal and civil possession of the Property, as shown by the conveyance and mortgage records of the Parish of East Carroll and by the testimony of the witnesses. Under La. Code Civ. Proc. art. 3653, Plaintiff had to show only that it has "better" title. Plaintiff has proven that it has title and that Plaintiff and its predecessors-in-title have possessed the Property. Non-navigable lakes on property are subject to the law governing dry land. La. Civ. Code. art. 506, comment (d). Lakes, therefore, need not be described separately in titles.

Before Walker acquired the Property in 1974, it was used and maintained by private predecessors-in-title. Prior to 1960, the Property was farmed, used for cattle grazing, and for other purposes, as established by testimony of Mr. Robert Amacker, Jr., which owned and acquired increasingly larger sections of the Property since the early 1900's. Documents filed in the public records establish that all of Walker's predecessors-in-title used the Property to its fullest extent. The Property records show the inscriptions of timber leases and deeds, farm leases, tax sales, mortgages, title disputes among private owners, and grants of railroad, highway and levee servitudes.

It was not uncommon at that time, prior to the late 1950's the then-owners did not prohibit people from fishing on the Lake. However, the owners at all times exercised their ownership interests and dominion over the Property and defended their title. (Pl. Exh. 10). In the 1940's and prior to the late 1950's, an

ungraveled, unpaved, mud ramp provided access to the lake from Highway 65, and the owners did not prohibit access over this muddy ramp, when it was passable. Since 1960, however, the owners and their lessees have prohibited access other than upon their terms, such as by imposing a fee. They built and maintained a fence around the Property.

Mr. James Shepherd was 80 years of age when he testified at trial. He had lived in the immediate vicinity of Lake Gassoway from 1954 until 1980 and testified that he and others knew that the lake was privately owned. The Nyanza Hunting Club obtained a lease on the Property in 1960. Mr. Shepherd was the President of the Club. The Club graveled and graded the mud ramp leading from Highway 65 to the lake and also maintained it. The Club also graded a boat launch on the western shore of Lake Gassoway in Section 15 so patrons who paid a fee could launch their boat. Fees were charged by the club to fish on the Lake and collected at a bait stand on behalf of the Club. These fees varied depending upon whether one fished standing on the shore of the Lake, launched one's own boat, or rented a boat. State witnesses confirmed that they paid a fee to access the Lake: "[t]he little house there where you go through the gate and you pay your fee right there,"; "[w]here you went in at that little store they had there where the gate is -- that little store – they charged $2.00 to launch the boat." One of the State's fishermen witnesses, Mr. Jerry Anderson, not only admitted that he had paid for access to the Lake in the past, but also

that he was a member of the Walker fishing club as late as 1998, well after the filing of this lawsuit, and that he paid Walker for the right to fish. Nevertheless, Mr. Anderson claimed that the Lake is public.

Mr. Shepherd testified that the Property was fenced and posted. The Club continued to lease and maintain the Property, and charge fees for access to the Lake, until Walker acquired the Property, the rental of boats continued until the mid 1980's. Walker employees kept the property posted and removed trespassers from the Property. State witnesses acknowledged that the Property was posted. Some of the State witnesses admitted that they had been arrested for trespassing more than once. "I knew the landowners did not want me there."

Walker presented the testimony of Sam House, who was the Sheriff of East Carroll Parish from July 1, 1968 to July 1, 1980, and Earl Fortenberry, both of whom were members of the Club. They testified that the Club restricted access to the Property to its own members for hunting, fishing and other purposes, and allowed access to Lake Gassoway by non-members only for the purpose of fishing, but not hunting, for a fee, the proceeds of which were used to build and maintain roads and the ramp. Others, including those who attempted to enter the Lake through the ditch, were considered trespassers and were asked to leave, or, if they did not leave, were arrested. Walker presented the testimony of 72 year old Reverend Arthur L. Thomas, a member of the Police Jury from 1974 to 1993, who has lived in the area all his life and

testified that it was generally known that Hollybrook owned the Property and that his constituents did not complain about the Lake not being accessible. Judge Charles Brackin, who lived most of his adult life in the area, testified that, when still in private practice, he handled the sale of the Property to Walker. He also confirmed the private nature of the Property. "Gassoway was a privately owned lake . . . [The fact that the waters came in from the Mississippi River did not in my opinion . . . change [the private] character [of Lake Gassoway.]"

As to the testimony received by the Court as it relates to various fisherman fishing in Gassoway Lake over various periods of time, the Court finds that those fishermen generally recalled paying a fee to launch their boats at Gassoway Lake at the end of the dirt road from US 65 over the levee to the lake. Those fishermen who fished Gassoway Lake by coming in through the outlet channel and/slash [sic] ditch at the bottom of the south end of Gassoway Lake recall encountering various obstacles in entering the Lake through that means. Thusly, the Court does not find that the testimony of these individuals who testified concerning fishing in the Lake in any way reflect upon whether Gassoway Lake is a navigable stream. The Court further finds that the outlet channel/ditch is in fact a drainage ditch of Gassoway Lake, that it has been altered by man and is not a navigable stream as perceived by the Civil Code in defining a navigable stream. Captain Disler was offered by the State as an expert and the Court

viewed and read his deposition even though the Court felt at times he expressed his views outside his expertise as a navigator. Captain Disler, in his video and deposition, testified as to the navigability of the outlet ditch. On the date Captain Disler visited the Lake Gassoway area, the river was at the same level of 24.6, Vicksburg gauge, as when the Court visited the lake and the ditch on March 9, 2000. The Court will note that Captain Disler never made it in his boat all the way into Gassoway Lake, but relied on the declaration of some local fisherman that they had gone all the way into the lake from the Rock Pile near Buncnes Cutoff. On March 9, 2000, when the river was at 24.6, Vicksburg gauge, the Court viewed the lake and the drainage ditch and observed that the ditch could not be considered navigable. The observations and opinions of the Court as to the navigability by Captain Disler simply did not exist to the view of this Court when it observed the lake and the ditch at the same level as when Captain Disler viewed the ditch and observed the lake from an aerial view in a plane.

The Court heard from several experts concerning the formation of Gassoway Lake. All of the experts testified that Gassoway Lake was not in existence in 1812, when Louisiana joined the Union and is thusly not controlled by the law that the State owns the beds of all rivers and lakes in existence at the time Louisiana became a State. Dr. Kemp testified to his theory of the creation of Gassoway was a result of a chute cutoff as contemplated by article 503 of the Civil

Code. The Court does not find that the evidence and maps support the position of Dr. Kemp that the lake was created as a result of a chute being silted at one end. Both Dr. Kesel and Dr. Kemp, experts called by the Plaintiffs' [sic] and Defense, respectively, agree that the lake was fully formed at the latest by 1908, however, based on a map supplied by the State, Dr. Kesel testified that the Lake was formed by 1894. All the experts further agreed that the lake was not formed as a result of an avulsion or neck cut off, which is the creation of an oxbow type lake, which is common along the Mississippi River

The Court carefully listened throughout the trial to all the experts and their theories on how Gassoway Lake was formed. The Court considered their educational backgrounds, their knowledge, their hands on training, their testimony as it related and interacted with the testimony of lay witnesses and persons who were knowledgeable of the area. The Court also considered their manner and demeanor while on stand, the assertiveness which they had in expressing their views, and the likelihood or probability of their testimony being accurate as it relates to all other evidence presented at the trial. The Court also considered their studies of the Mississippi River and knowledge of the river whether in the upper river (Lake Providence) or lower river (South Old River.) In considering and weighing all of this expert testimony as it relates to the forty witnesses who were called to testify, and considering the 240 exhibits which were introduced, which resulted in a transcript of 2,115

pages, the Court is firmly convinced that Dr. Kesel's opinion as to the formation of Gassoway Lake is a correct recitation of how Gassoway Lake was formed.

Examples as to why the ditch is not a navigable stream is that the ditch has been altered by man in that it makes a ninety degree angle at one point, due to materials placed by man, which causes the ninety degree turn. During many times of the year, the ditch has insufficient water for the smallest of boats to travel from Bunch's Cutoff up through the ditch into Gassoway Lake. There are man made objects, such as the lip which was man made, that prohibits the passage of this body of water during certain times of the year. The Court has also noted that the amount of vegetation in the ditch prohibits traversal of this area during certain times of the year and even during high water, one would have to leave the banks of the ditch and cross private land and run along beside the ditch in order to gain access to Gassoway Lake. Also, the fact that even though the ditch serves as a drain for the lake into a navigable waterway, Bunch's Cutoff, that does not make the drainage ditch from the lake a navigable stream.

Dr. Kesel convinced the Court that Lake Gassoway was not formed as a result of a chute cutoff, as speculated by Dr. Kemp, but the lake was created when the Mississippi river moved slowly and imperceptibly back eastward, which caused through accretion growing from the banks and closing what is now Gassoway Lake in the area which was previously farmland. The Court will note that Gassoway Lake is

a very shallow lake, ranging from four feet deep at low water to twelve feet in high water, which has not changed since it's [sic] formation and that the depth of the lake as compared to the depth of the Mississippi channel indicates that it was not a channel of the Mississippi River. Today, the channel of the Mississippi River is approximately three and a half miles east of Gassoway Lake, which again indicates that the Mississippi River, during the 1860's and 1870's, moved slowly and imperceptibly westwardly, washing away the west bank of the river. A map which was supplied by the State to Dr. Kesel indicates that the Mississippi River in the 1880's again imperceptibly began to move in a southeastwardly direction from whence it has previously come and left behind a swale, which was then, due to accretion, left a landlocked swale. According to the 1894 map it shows that Gassoway Lake was fully formed as a shallow swale, having been created by the slow movement of the Mississippi River back eastward from the same direction which it had come from in the 1860's and 1870's, forming Gassoway Lake on the land which was previously farmland and timberland. As it relates to Dr. Kemp's position that Gassoway Lake was formed as a result of a chute cutoff, whereby the ends of the chute would silt and close, the Court was not convinced that there was any evidence, maps, or otherwise, to support the position that a chute cutoff created Gassoway Lake. There was no credible evidence presented at trial that any accretion which formed on the bank was ever cut off at the location of Gassoway Lake or that the river ever opened a new channel at the location. The Court

further finds that the outlet channel/ditch is in fact a drainage ditch of Gassoway Lake, that it has been altered by man and is not a navigable stream as perceived by the Civil Code in defining a navigable stream. The Court further finds that Dr. Kesel's testimony regarding the other lakes is likewise credible and convincing and the lakes are land locked lakes, subject to private ownership.

As it relates to the position of the State that the public has a right to access Gassoway Lake during flood waters because it becomes a stream or channel of the Mississippi River is erroneous. Just because flood waters from a navigable stream cause private property to become accessible by boat from the navigable stream does not allow public access to that private property. The lake bed, the drainage ditch from the lake are all private property and therefore are not accessible to the public during high water or flood water.

The evidence clearly showed but for the actions of man, ie [sic] landowners, Gassoway Lake would virtually be non-existent during the low water of the Mississippi and during the drought months of the summer. The structures, such as the rocks, ninety degree turn, and other man made structures keep the lake from completely draining when no water is incoming.

Further support of the fact that Gassoway Lake is privately owned, the Court looks to the reports and testimony of the State Land Office, an agency of the defendant, State of Louisiana, who is charged with

the management of publicly owned property. The State Land Office does not lay claim to Gassoway Lake and that Gassoway Lake is landlocked and inaccessible by boat.

The State attempted to show that it owns the lake and it's [sic] waters pursuant to the provision of Louisiana Revised Statute 9:1101, which provides that the beds and waters of lakes not under the direct ownership of any person on August 12, 1910, were declared to be property of the State. The testimony and evidence received in the case that the predecessors in title to the land in question were in private ownership of the land in question on August 12, 1910. Also, the statute indicates that acquisition of property under Revised Statute 9:1101 does not affect acquisition of property by alluvion or accretion and that it was specifically testified to by Dr. Kesel that alluvion or accretion was involved in the creation of Gassoway Lake.

Although the Court finds that Gassoway is not a publicly owned body of water and is privately owned and that the ditch is not a navigable stream, the Court further notes that this particular tract of land has been in litigation before and previous courts have ruled that this land was subject to private ownership. Judgments of 1911, 1918, 1963, and 1967 support the position that the lands at issue had been adjudicated to Plaintiff and it's [sic] predecessors in title against the State and Fifth Louisiana Levee District. (Plaintiff's exhibits 75, 76, 77, and 78).

Therefore, this Court finds that the land subject to this lawsuit is privately owned by the Plaintiffs, that the lake and ditch are not navigable by law, that the State has never claimed this land in the past, and cannot do so now, that these matters have been litigated before and the Supreme Court affirmed that this land was subject to private ownership. Therefore, the Court finds that the Plaintiff has met its burden of proof and grants a judgment in favor of Plaintiff and the Court enters a permanent injunction enjoining the State or the general public from going on or about property subject to this litigation, which includes Gassoway Lake and the drainage ditch which runs from Bunch's Cutoff northward into the Gassoway Lake. Court will maintain jurisdiction of this case to enforce any provisions of a judgement which will be signed by this Court on proper presentation.

s/ John R. Joyce
JUDGE
AD HOC 6th JUDICIAL DISTRICT